Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 20 | APRIL 23, 1986 | No. 16

This issue contains:

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

U.S. Customs Service

Treasury Decisions

19 CFR Part 175

(T.D. 86-73)

Decision on Domestic Interested Party Petition Concerning Tariff Treatment of Hook and Eye Tabs Incorporated in Brassieres

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final decision.

SUMMARY: By a previous Federal Register notice, the public was advised that Customs had received a petition submitted on behalf of several domestic interested parties with respect to the tariff treatment of hook and eye tabs incorporated in imported brassieres. The metal hooks and eyes are manufactured and attached to continuous textile strips in the Philippines, imported into the U.S. duty-free under the Generalized System of Preferences and further processed into individual hook and eye tabs which are then exported and assembled abroad into finished brassieres. The petitioners contended that when the finished brassieres are imported, Customs is incorrectly excluding the value of the hook and eye tabs, and that no allowances should be made for the value of the tabs in the duty assessed on the brassieres because the processing in the U.S. is not sufficient to transform the strips into products of the U.S.

After further review of the matter, and consideration of the comment received in response to the notice, Customs agrees with the petitioners that these operations are not sufficient to transform the imported hook and eye tabs into domestic products. Accordingly, when the finished brassieres are imported into the U.S., the value of the hook and eye tabs will not be excluded from the dutiable value of the brassieres into which they were assembled.

EFFECTIVE DATE: May 8, 1986.

FOR FURTHER INFORMATION CONTACT: Earl Martin, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), and Part 175, Customs Regulations (19 CFR Part 175), a domestic interested party petition was filed with Customs concerning the tariff treatment of hook and eye tabs incorporated in imported brassieres. The petitioners are manufacturers and producers of metal hook and eye components which are sewn by machine onto textile strips. These strips are placed on reels and then fed into sealing machines which sever the strips into individual tab units. After heat-sealing, these tab units are ready for incorporation into brassieres.

The imported merchandise is produced using nearly identical methods. However, unlike the domestically-produced merchandise which is produced in one location, the U.S., the imported merchandise is completed in two locations. The textile strips with the hooks and eyes attached are manufactured and produced in the Philippines. These strips are then imported into the U.S. where they are currently classified under the dutiable provision for "Hooks and eyes," in item 745.60, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202). However, these strips are eligible for duty-free treatment under the Generalized System of Preferences (GSP) provided for in Title 5 of the Trade Act of 1974, as amended (19 U.S.C. 2461 et seq.). The GSP provides that when an eligible article is imported into the customs territory of the U.S. directly from a country, territory, or association of countries listed in General Headnote 3(c)(i), TSUS, it shall receive duty-free treatment, unless excluded. These strips of uncut hook and eye tabs are being imported from the Philippines which appears on the GSP list of designated beneficiary developing countries whose articles receive duty-free treatment from the U.S. Accordingly, no duty is paid on these articles when they are imported.

Once in the U.S., these strips of hook and eye tabs are then cut into individual tab units, heat-sealed, then exported and assembled abroad into finished brassieres. The finished brassieres are then imported into the U.S. under the provisions for "Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting * * *," in item 807.00, TSUS. The duty on these articles is based on the full value of the imported article, less the cost or value of any fabricated components which are products of the U.S. In Customs Ruling #053121 M, dated November 7, 1977, Customs determined that cutting and heat-sealing imported hook and eye

strips in the U.S. into individual hook and eye tab units substantially transforms the strips into products of the U.S. Since these completed tabs are considered to be products of the U.S. for purposes of item 807.00, TSUS, their value is excluded from the dutiable value of the imported brassieres.

The petitioners contended that this previous Customs ruling is erroneous. It is their view that hook and eye strips of foreign origin that are imported into the U.S. and merely cut and heat-sealed into individual tabs are not substantially transformed into products of the U.S. Accordingly, they claimed that the cost or value of the tabs should not be excluded from the dutiable value of the brassieres imported under item 807.00, TSUS.

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21 (a)), before making a determination on this matter, Customs published a notice in the Federal Register on September 26, 1985 (50 FR 39067), inviting written comments from interested parties on the classification issue. In response, only one comment was received. The commenter agreed with the petitioners. Accordingly, after consideration of the petitioners' views and those of the commenter, and after further review of the matter, Customs has determined that hook and eye strips of foreign origin that are imported into the U.S. and merely cut and heat-sealed into individual tabs are not substantially transformed into products of the U.S. Therefore, after the effective date of this decision, the cost or value of the tabs will not be excluded from the dutiable value of the brassieres imported under item 807.00, TSUS, and Customs Ruling #053121 M, dated November 7, 1977, will be rescinded.

Authority

This notice is published in accordance with § 516(b), Tariff Act of 1930, as amended (19 U.S.C. 1516(b)), and § 175.21(a), Customs Regulations (19 CFR 175.21(a)).

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: March 26, 1986.

DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, April 8, 1986 (51 FR 12014)]

(T.D. 86-74)

Tuna Fish—Tariff Rate Quota

The tariff-rate quota for the Calendar Year 1986, on tuna classifiable under item 112.30, Tariff Schedules of the United States (TSUS).

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1986.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 112.30, TSUS, is based on the United States pack of canned tuna during the preceding calendar year.

EFFECTIVE DATE: The 1986 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Acting Quota Program Manager, Admissibility Requirements Section, Commercial Compliance Division, Office of Commercial Operations, U.S. Customs Service, Washington, D.C. 20229 (202-566-8592).

It has now been determined that 81,092,100 pounds of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1986, at the rate of 6 percent ad valorem under item 112.30, TSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under item 112.34, TSUS.

(QUO-2-CO:C:C:A)

Dated: April 4, 1986.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, April 11, 1986 (51 FR 12585)]

(T.D. 86-75)

Recordation of Trade Name: "CRYOMEC, INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On September 25, 1985, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CRYOMEC, INC." was published in the Federal Register (50 FR 38939). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments, submitted in opposition to the recordation and received not later than November 25, 1985.

Stremikon Corporation, a Michigan corporation, commented in opposition to recordation of the trade name, citing concern that "CRYOMEC, INC." is confusingly similar to Stremikon Corporation's "CRYO-MED" trademark registered on the Principal Register of the United States Patent and Trademark Office (Reg. No. 1,068,060) used for refrigerator installations and parts thereof. Cryomec, Inc. is the owner of the registered and recorded "CRYO-MEC IN DESIGN" service mark (Reg. No. 1,228,721).

We find that the two marks lawfully co-exist. Therefore, genuine articles bearing the "CRYO-MED" trademark shall not be seized or detained as confusingly similar to "CRYOMEC, INC."

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "CRYOMEC, INC." is recorded as the trade name used by Cryomec, Inc., a corporation organized under the laws of the State of California, located at 1265 North Kraemer Boulevard, Anaheim, California 92806. The trade name is used in connection with the following goods, manufactured in the United States: pumps, particularly reciprocating and centrifugal pumps for cryogenic liquids, cryogenic vaporizers, and conversion systems for converting cryogenic liquids to a gas, and related equipment, including heat exchangers.

EFFECTIVE DATE: April 11, 1986.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: April 8, 1986.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, April 11, 1986 (51 FR 12586)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

Proposed Consolidation of New Orleans, Gramercy, and Baton Rouge, Louisiana, Customs Ports for Marine Purposes

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed limited consolidation of ports.

SUMMARY: This document proposes to consolidate the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, for marine purposes only. This change, if adopted, would enable Customs to obtain more efficient use of its personnel, facilities, and resources. It would eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it would simplify vessel entry and clearance procedures and reduce expenses and paperwork for all parties involved thereby enabling Customs to provide better and more economical service to carriers, importers, and the public.

DATE: Comments must be received on or before June 9, 1986.

ADDRESS: Written comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Richard C. Coleman, Office of Inspection (202-566-8157). Legal Aspects: Donald H. Reusch, Carriers, Drawback and Bonds Division (202-566-5732), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

The Customs Service field organization currently consists of seven geographical regions further divided into districts, with ports of entry within each district. Customs ports of entry are locations

(seaports, airports, or land border ports) where Customs officers or employees are assigned to accept entries of merchandise, collect duties, clear passengers, vehicles, vessels, and aircraft, examine baggage, and enforce the Customs and related laws.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs is proposing to consolidate, for marine purposes only, the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, located in the New Orleans, Louisiana, Customs district in the South Central Region.

Inasmuch as these three ports are located within approximately 60 miles of one another on the Mississippi River and perform similar services, it was estimated that the proposed consolidation would significantly reduce expenses without impairing Customs ability to provide services to area businesses or to the general public.

Under this proposal, the laws and regulations administered and enforced by Customs relating to the entry of merchandise would continue to apply at the ports of New Orleans, Gramercy, and Baton Rouge, with each of these ports retaining its port code as well as its current geographical limits. However, the three ports would be considered to be one port for the purposes of the navigation laws. All of the requirements prescribed by the navigation laws administered and enforced by Customs, such as reporting the arrival and making formal entry of vessels arriving at the consolidated marine port from a foreign or another U.S. port (depending upon the vessel's nationality); and obtaining a permit to proceed between the consolidated port and other U.S. ports, would have to be complied with, as is now the case in existing consolidated ports.

It is anticipated that the proposed consolidation also will result in reducing penalties incurred under the navigation laws if carriers fail to enter and properly clear merchandise being shipped in a residue cargo movement within the consolidated marine port (i.e., the ports of New Orleans, Gramercy, and Baton Rouge), and will reduce paperwork for carriers, importers, and Customs, because of the reduction of penalty cases.

If this proposal is adopted, there would be no change in the current geographical limits of each port. However, it will be necessary to amend the list of Customs regions, districts, and ports of entry set forth in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), to reflect the consolidation of these ports for the purposes of the navigation laws.

Executive Order 12291

Because this proposal related to the organization of Customs, it is not a regulation or rule subject to E.O. 12291.

Regulatory Flexibility Act

It is certified that the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this proposal because it will not have a significant economic impact on a substantial number of small entities.

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the proposal may have a limited effect upon some small entities in the affected areas, it is not expected to be significant because changes in the Customs field organization in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Lists of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

Proposed Amendment to the Regulations

If the proposed consolidation of the ports of New Orleans, Baton Rouge, and Gramercy, Louisiana, for the purposes of the navigation laws, is adopted, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), will be amended as follows:

In the South Central Region—New Orleans La., under the column headed "Name and headquarters", the following phrase would be added under the listing "New Orleans, La."

> "(The ports of New Orleans, Baton Rouge, and Gramercy, consolidated for purposes of the navigation laws. See T.D. 86-—— 51 FR ——, ——— 1986.)"

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Authority

This change is proposed under 19 U.S.C. 66 and 1624 as well as the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949-1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449).

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: March 14, 1986.
Francis A. Keating II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 10, 1986 (51 FR 12339)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86–676)

MAST INDUSTRIES, INC., APPELLEE *v.* UNITED STATES, APPELLANT

Veronica A. Perry, Civil Division, Department of Justice, of New York, New York, argued for appellant. With her on the brief were *Richard K. Willard,* Assistant Attorney General, *David Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Michael P. Maxwell, Greenfield, Desiderio, Lebowitz & Silverman, of New York, New York, argued for appellee. With him on the brief was *Steven P. Florsheim.*

Appealed from: U.S. Court of International Trade.

Judge DICARLO.

(Appeal No. 86–676)

MAST INDUSTRIES, INC., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided April 1, 1986)

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*

BALDWIN, *Circuit Judge.*

This appeal is from a decision of the United States Court of International Trade holding that a sleepshirt was designed, manufactured, marketed, and used as nightwear, and an order directing the U.S. Customs Service to permit entry of the merchandise under Item 384.5226 of the Tariff Schedules of the United States.

Appellant's arguments are adequately treated in the lower court's opinion No. 85–114, dated October 28, 1985. We affirm on the basis of that opinion.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao	Jane A. Restani
Morgan Ford	Dominick L. DiCarlo
James L. Watson	Thomas J. Aquilino, Jr.
Gregory W. Carman	

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-34)

HERAEUS-AMERSIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-4-00525

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Judgment for defendant.]

(Decided March 26, 1986)

Fitch, King and Caffentzis (*Richard C. King* and *Peter Fitch*) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Barbara Epstein*) for the defendant.

CARMAN, *Judge:* This case involves the proper tariff classification of "bell jars," otherwise described by plaintiff as "large, tubular articles, made of fused silica," with "[o]ne end * * * closed, in approximately hemispherical shape, and the other * * * open." The United States Customs Service (Customs) classified the merchandise under item 548.05, Tariff Schedules of the United States (TSUS), as articles of glass, other than tubes or tubing, not specially provided for. Plaintiff claims that the merchandise is more specifically classified under item 548.01, TSUS, as glass tubes.

Following are the relevant tariff provisions:

	Schedule 5, Part 3, Subpart D:	
	Articles not specially provided for, of glass:	
	Tubes and tubing with ends processed:	
[Claimed under:] 548.01	Containing over 95 percent silica by weight	7% ad val.[1] 6.7% ad val. 6.4% ad val.

151-377 O - 86 - 2

* * * * * * *

[Classified under:]

548.05	Other	12.5% ad val. 11.8% ad val. 11.0% ad val.

[1] As modified by T.D. 68-9, the rate of duty depends upon the year of entry. Plaintiff's merchandise was exported from West Germany and entered at the port of Newark from 1979 through 1981.

Upon a trial and submission of post-trial briefs, the Court concludes that the plaintiff has not overcome the presumption that the government's classification is correct by showing that the merchandise is more specifically described as tubes. *See* 28 U.S.C. § 2639(a)(1) (1982).

Discussion

At trial, plaintiff offered into evidence a sample of the imported merchandise. It is cylindrical, white, and the texture of its exterior surface is sandy. The interior surface is smooth and glossy. One end is closed, in approximately hemispherical shape, and the other is open. The outside diameter of the sample is 11 inches. Its wall thickness is ⅜ inch and it is 20 inches high. The parties have stipulated, however, that the subject merchandise of this case ranges in sizes up to 36 inches in diameter and up to 94 inches high. Typical sizes are 18 to 36 inches in diameter, 24 to 94 inches high, and with ⅜ to ¾ inch wall thicknesses. All of the imported merchandise is similar in appearance to the exhibit, except for size.

The parties also stipulated that the merchandise is invoiced as Rotosil tubes with one end hemispherically closed, or as bell jars, and that the imported merchandise is not "tubing."

Plaintiff bases its claimed classification on the contention that the imported articles are commonly known as tubes. Plaintiff relies on various dictionary definitions of the word "tube" and concludes simply that "what is a 'tube' is not determined by size, material, or use, but by the shape of the article." Plaintiff's Brief 9. A sampling of one such dictionary definition, which is fairly representative, follows:

> 1. A long hollow cylindrical body, as of wood, metal, rubber, or glass, generally used for the conveyance of something through it, but often as a receptacle for holding something; a pipe.

Funk & Wagnalls New Standard Dictionary of the English Language (1942).

Plaintiff quotes the decision in *Terumo-America, Inc.* v. *United States,* 2 CIT 121, 132 (1981) (glass rods used in the manufacture of thermometers classified as tubing), which states, "The tariff schedules do not define tubes, and the *Tariff Classification Study, Explanatory and Background Materials* (1960) fails to shed light on

this question." From this, plaintiff surmises that the visual appearance of the articles and the testimony of its witness are determinative of the correct classification of the merchandise. The witness, Mr. Allan C. Kreutzer, vice president of marketing and sales for the plaintiff company, testified that the imported articles are known as tubes. Plaintiff fails, however, to cite and deal with the compelling body of relevant case law, which clearly shows not only that an article is not classifiable as a tube merely because it is called a tube, *see United States* v. *The A.S. Aloe Co.*, 20 CCPA 319, 322, T.D. 46111 (1932),[2] but also that the shape of the article as a tube is not controlling for customs classification purposes. *See United States* v. *Kelvin & Wilfrid O. White Co.*, 24 CCPA 327, 331, T.D. 48768 (1937). Where an article "has a function other than that performed by a tube, as that term is ordinarily understood," it is not properly classified as a tube. *United States* v. *E.H. Sargent & Co.*, 20 CCPA 172, 176, T.D. 45774 (1932). Plaintiff's statement that the use of the imported articles is "immaterial as to whether or not they are tubes," Plaintiff's Brief 6, is patently incorrect for customs classification purposes.

In the case at bar, the evidence at trial establishes that plaintiff's Rotosil articles are used for purposes not ordinarily associated with tubes. As Mr. Kreutzer testified,

> [T]he first use is as bell jars * * * in the semiconductor industry * * * for the manufacture of polycrystalline silicon by the Siemens process. This process uses the decomposition of the gas tri-chloro-silane. In this process a long, very thin, rod in the form of a hairpin of pure silicon is attached to a reactor plate, usually made of silver, and the tube or bell jar is placed over this rod and sealed against the reactor plate. The tri-chloro-silane and hydrogen are introduced via gas ducts in the reactor plate, and an electrical current passed through the silicon hairpin. The combination of these two chemicals and the electrical current causes a decomposition reaction, into pure silicon, which deposits on the hairpin, and hydrochloric acid gas, which is exhausted from the bell jar.
>
> After this process is complete, the pure silicon material is removed, and broken up into pieces. This material is then placed in other Rotosil or other brand of fused silica tubes or crucibles such as the imported articles, with the open end up. This polycrystalline silicon is then melted, and by dipping down a single pure crystal seed, a single pure crystal of silicon several inches in diameter and several feet long is pulled from the molten mass. This process is called the Czochralski process. Rotosil crucibles can also be used in other melting processes, including precious metals in the refining or casting operations, or melting any other material which is corrosive at high temperature.

[2] In contrast, an article may warrant classification as a tube even though it is not commercially referred to as a tube. *See, e.g., Winkler-Koch Engineering Co.* v. *United States*, 16 Cust. Ct. 42, 47, C.D. 982 (1946) (oil well casing classified as iron or steel tubes not specially provided for).

> After the single crystal which has been drawn from the crucible is further processed, it is sliced into wafers which, after substantial additional processing, become the micro-chips of electronics. In one of the steps of this processing, called epitaxy, the tubes are normally used closed end down, and in this orientation are called epitaxial reactors. In this process wafers sawn from the single crystal and further processed are loaded into graphite susceptors and covered with the tube. The end of the tube is sealed against a plate, and gases introduced into the tube through the plate sealing the open end. Epitaxy coats the wafers with pure silicon.

Transcript 114–16.

It is clear that the purposes of plaintiff's merchandise go well beyond those oridinarily associated with tubes, such as conveying gases or liquids or serving as mere receptacles.[3] In each of the following cases, the court classified, on the basis of use, tubelike articles of glass under provisions other than that for tubes.

In *E.H. Sargent & Co.*, the Court of Customs and Patent Appeals reversed the lower court and found that graduated Bunsen tubes, Roehrig tubes with projecting faucets, and absorption tubes open at both ends and having between these ends a succession of globular formations connected by small necks, were properly classifiable as scientific glass articles under paragraph 218(a), Tariff Act of 1930. The court did not elaborate on the function of each article, but indicated that their scientific purposes could not be accomplished by the use of mere tubes. 20 CCPA at 176.

The court found that a centrifuge sedimentation tube constructed for use in centrifugal machines and used to make urinary analyses is "a chemical article and more than a tube." *The A.S. Aloe Co.,* 20 CCPA at 323.

Finally, in *Kelvin & Wilfrid O. White Co.,* the court found that glass sounding tubes used to record the depths of ocean water also are more than tubes. The interior of each tube was coated with a chemical that changed color when coming in contact with salt water. The court observed:

> [W]hen scientific tubes or tubing are made into different completed articles which perform particular chemical or scientific purposes, they cease to be the tubes or tubing for which Congress made provision in subdivision (b) [paragraph 218, Tariff Act of 1930]. When the new article performs a function not performed by tubes or tubing, as those terms are commonly understood, the merchandise loses its character as tubes or tubing.

24 CCPA at 331.[4]

---

[3] The uses of tubes are not necessarily limited to conveying or holding something, but must nevertheless be uses that are ordinarily associated with tubes. In *Ball* v. *United States,* 8 Ct. Cust. Appls. 143, 146, T.D. 37271 (1917), the court found that "[t]he uses of steel tubes as material are so common and well known that in the absence of commercial designation we can not say the articles here are not steel tubes within the common understanding of that term." *Id.*

As Mr. Kreutzer's testimony indicates, the merchandise in the case at bar is designed to perform very special industrial functions—namely, to serve as bell jars for the manufacture of polycrystalline silicon by the Siemans process, as crucibles for the melting of silicon in the Czochralski process or for the melting of precious metals, and as epitaxial reactors for the coating of silicon wafers. Transcript 115–16. Further, Heraeus-Amersil manufactures articles to the particular specifications of each customer depending on the intended use. *See* Transcript 139–40. Importantly, the tubular shape of the articles is not nearly so important as the material from which the articles are made. *See id.* at 113. As Defendant's Exhibit A, a brochure of Heraeus Quarzschmelze, describes plaintiff's Rotosil bell jars:

> The inner surfaces of these bell jars are always fireglazed and very densely fused to an almost glassy finish, thus providing the best conditions for a clean and troublefree operation. The walls are otherwise opaque and therefore act as thermal insulators—a very desirable effect which contributes toward lower running costs. After a lining of the bell jars with an additional layer of pure transparent quartz glass was found to improve the purity of the deposited silicon significantly, the demand has increasingly shifted to bell jars fitted with the additional inner layer. The best in this respect are bell jars with an inner layer of synthetic quartz glass * * *.

It is clear that the articles are designed as "more than" conveyers of liquids or gases, or as mere receptacles. *See E. Green & Son* v. *United States,* 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971) (application of "more than" doctrine must be determined in each case on its own facts).

In discussing plaintiff's imported merchandise, plaintiff's witness Kreutzer discussed generally all of the similar merchandise manufactured by plaintiff, referring to the merchandise as tubes or tubing, sometimes qualified by the phrase "with one end closed," and otherwise called "bell jars, crucibles, furnace or diffusion tubes, furnace muffles, or reactors." Transcript 113, 137. Mr. Kreutzer also discussed similar merchandise manufactured by plaintiff in 1962 to 1963 referred to as cylindrical pipes with closed ends, cylindrical shape opaque muffles, or cylindrical pots. *Id.* at 117. But as plaintiff has developed the capability of manufacturing larger "tubes," *id.* at 116, and "their use in the semiconductor industry has grown, they have also acquired other names, depending upon the particular use to which the customer will apply them." *Id.* at 117. Mr. Kreutzer concluded, "The one term which properly

---

[4] The issue in *Sargent, Aloe* and *Kelvin* was whether the merchandise was classifiable as tubes or tubing under paragraph 218(b), Tariff Act of 1930. With the enactment of the TSUS, items 548.01 and 548.03 continued the existing rate treatment for tubes and tubing previously dutiable under paragraph 218(b). *See Tariff Classification Study, 5th Supplemental Report* 38, 114 (1963).

describes them, no matter in what orientation, or for what purpose used, is tubes with one end closed." *Id.*[5]

The shape of the articles or that they are called tubes, however, is not controlling. The major functions of the articles are not those of tubes. Their primary functions are as bell jars, epitaxial reactors and crucibles for the manufacture of silicon chips in the semiconductor industry. *Cf. E. Green & Son* v. *United States,* 59 CCPA at 35, 450 F.2d at 1399 (primary function of finned tubes to heat or cool water flowing through them warranted classification as manufactures of iron rather than as iron pipe or tubes). Although the tariff provision for tubes is *eo nomine,* use in this case, as in the other cited cases dealing with the classification of tubelike articles, is of paramount importance and cannot be ignored in determining the identity of the imported articles for customs classifications purposes. *See United States* v. *Quon Quon Co.,* 46 CCPA 70, 73, C.A.D. 699 (1959) (woven rattancore classified according to its use as parts of furniture notwithstanding the *eo nomine* tariff provision for "baskets").

Conclusion

Because plaintiff's imported merchandise is specifically designed and manufactured to perform functions not commonly understood to be those performed by tubes, plaintiff has not met its burden of proving that Customs' classification is incorrect by showing that the merchandise is more specifically provided for under item 548.01, TSUS, as glass tubes with ends processed. The Court accordingly sustains Customs' classification of the imported merchandise under item 548.05, TSUS, as other glass articles not specially provided for.

(Slip Op. 86-35)

Ehrenreich Photo-Optical Industries, Inc., plaintiff *v.* United States, defendant

Court No. 76-5-01308

Before Bernard Newman, *Senior Judge.*

Photographic Printers

Plaintiff challenges the classification by Customs of imported photographic enlarging printers as "enlargers" under item 722.18, TSUS, claiming that the merchandise should properly have been classified as "[e]quipment specially designed for photofinishing * * * not specially provided for" under item 722.94, TSUS. The print-

[5] It is noteworthy, nevertheless, that plaintiff in its catalogues and purchase orders distinguishes the subject imported merchandise from its tubing and refers to the imported articles by the names denoting the intended functions, i.e., Rotosil bell jars or crucibles. *See* Plaintiff's Exhibit 3, at 16, Plaintiff's Exhibit 4 at 26, and Defendant's Exhibit C, at 26 (price lists); Defendant's Collective Exhibit D *passim* (purchase orders).

ers are automated high speed machines designed to optically produce color photographic enlargements, called "prints", of the image on a photographic negative.

Held: Plaintiff failed to establish that the printers, which have the same basic features and function as prototype hand-operated enlargers, but are more automated and faster than the latter, do not fall within the common meaning of the term "enlargers"; also, plaintiff failed to prove its claim that there was a commercial designation for the term "enlarger" that excluded photographic printers.

While plaintiff showed that the printers are photofinishing equipment within the purview of item 722.94, they are specially provided for under the *eo nomine* provision covering enlargers in item 722.18, and are properly dutiable under that provision pursuant to General Interpretative Rule 10(c), TSUS.

In applying General Interpretative Rule 10(c), TSUS, an *eo nomine* provision is regarded as more specific than a use provision qualified by a "not specially provided for" clause. *United States* v. *E. Besler & Co.*, 64 CCPA 121, C.A.D. 1193, 557 F.2d 270 (1977).

[Judgment for defendant.]

(Decided March 26, 1986)

Serko & Simon (Joel K. Simon and *George S. Locker, Esqs.*, of counsel), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch; and *Judith M. Barzilay, Esq.*, for the defendant.

BERNARD NEWMAN, *Senior Judge:*

INTRODUCTION

This action presents for determination the proper classification, and hence rate of duty, for certain photographic enlarging printers imported by plaintiff from the United Kingdom and entered through the port of New York during the period of June 1973 through September 1975.[1] In liquidating the entries, Customs classified the imports as photographic enlargers under item 722.18 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, and assessed duty at the rate of 7.5 percent ad valorem.[2] Relying on *United States* v. *E. Besler & Co.*, 64 CCPA 121, C.A.D. 1193, 557 F.2d (1977), defendant proposes as an alternative classification that the merchandise is dutiable under the provision for certain cameras in item 722.16, TSUS, as modified by T.D. 68-9, at the rate of 7.5 percent ad valorem. Plaintiff claims that the imports are properly dutiable under the provision in item 722.94, TSUS, as modified by T.D. 68-9, for equipment specially designed for photofinishing, not specially provided for, at the rate of 5 percent ad valorem.

The court finds that the merchandise was properly classified by Customs under item 722.18.

---

[1] Specifically, the imports comprise four models of Durst printers: ACS M 5/8 Miniprinter; ACS 78 MK2 Type O; M 6/12; and M 5/8 Type O. There are no material differences between these models for tariff classification purposes (Tr. 27).

[2] At the trial, plaintiff abandoned its claims with regard to entry No. K157732, which was one of the entries covered by the summons and complaint (Tr. 16). Plaintiff also abandoned the action respecting "various and assorted parts" covered by entry No. K232375. *Id.*

Statutes Involved

19 U.S.C. § 1202, Tariff Schedules of the United States:

Classified under:
Schedule 7, Part 2, Subpart F:
Photographic cameras (other than motion-picture cameras), photographic enlargers, and combination camera-enlargers:

* * * * * * *

722.18 Other enlargers and camera-enlargers .... 7.5% ad val.

Defendant's Proposed Alternative Classification:
Schedule 7, Part 2, Subpart F:
Photographic cameras (other than motion-picture cameras), photographic enlargers, and combination camera-enlargers:

* * * * * * *

Other cameras:

* * * * * * *

Other than fixed-focus

* * * * * * *

722.16 Valued over $10 each .... 7.5% ad val.

Claimed under:
Schedule 7, Part 2, Subpart F:
Equipment specially designed for photofinishing (still picture):

* * * * * * *

722.94 Other, not specially provided for .... 5% ad val.

Facts

The record in this case comprises the testimony of three witnesses on behalf of plaintiff and three witnesses for defendant. Additionally, each party submitted various exhibits; the official entry papers were received without marking (Tr. 19).[3]

The pertinent facts are:

The merchandise in controversy consists of Durst printers, which are automated machines designed to optically produce color photo-

[3] At trial and in its reply brief, plaintiff alluded to defendant's affirmative response to plaintiff's request for an admission that the imports are other than enlargers (Tr. 3–4, 110–111). The court reminded counsel of an order of March 6, 1985 denying defendant's motion to withdraw its admission (Tr. 5, 109–110). However, at trial plaintiff did not offer defendant's admission into evidence, but rather submitted testimony and other evidence on the issue of whether the imports are enlargers, and did not object to defendant's evidence on that issue. Since defendant's admission was neither offered nor received in evidence, the admission is not part of the record in this case. *Avant* v. *Polaroid Corp.*, 441 F. Supp. 898 (D.C. Mass 1977), *aff'd*, 572 F.2d 889 (1st Cir. 1978), *cert. den.* 439 U.S. 837 (1978) (Rule 36 admissions not introduced into evidence by plaintiff would not be considered by the court.). *Cf. S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 82 Cust. Ct. 197, 204, C.D. 4802 (1979) ("* * * to be considered by the court, answers to interrogatories must be introduced into evidence and cannot merely be judicially noticed."). Accordingly, the court cannot agree with plaintiff's contention that defendant's admission is conclusive of the issue of whether Customs' classification was correct.

graphic enlargements, called "prints", of the image on a photographic negative at high speed. Following is the basic process by which the imports print photographic enlargements: Under darkroom conditions, the operator of a printer loads it with photosensitive positive paper on which exposures will be made. The printers have a built-in paper transport mechanism that holds the photosensitive paper. A photographic color film negative is placed in the negative carrier of the printer. The operator then presses an "exposure" button to activate the machine. Durst printers have a light source, that when activated during printing, emits light through the photographic negative and then through a lens onto the positive paper.

The high speed printing process is automated and is not viewed by the operator. The end product produced by the imports is called a "print", which may be as large as 11 x 14 inches in size. Such print consists of the photographic positive containing a latent image which is not visible in normal room light, and must be finished by chemical processing to produce a viewable image in the form of what is ordinarily regarded as a "photograph".

DISCUSSION

Defendant contends that based upon their primary design, construction and function, Durst printers are encompassed by the common meaning of the term "enlarger", and are also included within the dictionary definition of "camera" as articulated by the Court of Customs and Patent Appeals in *Besler, supra.* Respecting plaintiff's claim, defendant argues that the imports are not classifiable under item 722.94 because they do not finish the photo; and even assuming that the printers are photofinishing equipment, by virtue of General Interpretative Rule 10(c) they are more specifically provided for, either as cameras or enlargers.

Relying on the principle of "commercial designation", plaintiff insists that Durst printers are not known or regarded in the photographic industry as enlargers or cameras, but rather as "printers". Plaintiff also argues that the imports are not designed nor do they function as enlargers within the common or commercial meaning of that term, but are "more than" enlargers. In support of its claim under item 722.94, TSUS, plaintiff asserts that Durst printers are known and used as photofinishing equipment.

Common Meaning

Resolution of the classification issue in this case requires a determination of the meaning of the *eo nomine* provision for "enlargers" as that term is used in item 722.18, TSUS. Fundamentally, in the absence of a special commercial designation, the language of a tariff provision is to be construed in accordance with its common meaning. The common meaning of a tariff term is a matter of law to be determined by the court; and in making such determination,

the court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. The testimony of witnesses respecting common meaning may properly be considered by the court, but such testimony is advisory only and has no binding effect on the court. *United States* v. *Corning Glass Works,* 66 CCPA 25, C.A.D. 1216, 586 F.2d 822 (1978); *United States* v. *E. Besler & Company,* 64 CCPA at 124; and *United States* v. *National Carloading Corp.,* 48 CCPA 70, C.A.D. 767 (1961).

In support of its position that the printers fall within the common meaning of the term "enlarger", defendant cites:

Webster's Third New International Dictionary (1963), p. 754:

> One that enlarges, *specif.:* an optical projector used to produce a photographic enlargement.

In addition to the foregoing lexicographic authority, the court has consulted:

McGraw-Hill Dictionary of Scientific and Technical Terms (3d ed. 1984), p. 546:

> enlarger [OPTICS] An optical projector used to project an enlarged image of a photograph's negative onto photosensitized film or paper. Also known as a photoenlarger.

and

McGraw-Hill Encyclopedia of Science & Technology (5th ed. 1982), Volume 10, p. 212:

> Contact and projection printers. Negatives provide the primary records of photography in the black-and-white field and to an increasing extent in color. In many cases, such as the document reproduction field, they may be more useful than the positives. In general, however, positive prints are required, and such prints are made from negatives in contact printers and projection printers (enlargers).
>
> * * * * * * *
>
> *Projection printers (enlargers).* These are optical projectors consisting of a lamp house and light source, a holder for a negative, a condenser or diffusing sheet, a projection lens designed to give optimum quality at relatively low magnifications, means for focusing for the desired magnification, sometimes automatically coupled to ensure good focus at all magnifications (autofocus enlargers), a support for the optical components, and a board or easel to carry the sensitive paper * * *. Projection printers may expose individual paper sheets or rolls of paper from single negatives or rolls of negatives.

Defendant insists that the component features and function of Durst printers coincide completely with the common understanding of the term "enlarger". Thus, defendant points out that the printers have a light source, a negative holder or carrier, a method of diffusing light, a lens, a means for focusing (or prefocusing), a sup-

port for the optical components and an easel which serves to hold or carry the photosensitive paper. Significantly, four of the witnesses who testified at the trial agreed that Durst printers fall within *Webster's* definition, *supra* (Tr. 88, 126, 227–28, 273–74). Consequently, the court is persuaded that Durst printers are, by design and function, photographic enlargers within the common meaning of that term, as contended by defendant.

In essence, plaintiff's position is that the provision for enlargers in item 722.18, TSUS, is limited to certain prototype hand-operated machines, which are more flexible in operation for certain specific uses than plaintiff's automated high speed printers. While it is true that the imports are automated machines rather than prototype hand-operated machines, this difference does not affect their classification. It is fundamental that an *eo nomine* designation without limitation or legislative intent, judicial decision or administrative practice includes all forms of the article. *National Carloading Corp., supra; Nootka Packing Co.* v. *United States,* 22 CCPA 464, T.D. 47464 (1935). On that score, the evidence of record clearly demonstrates that the imports possess the same basic components and function as hand-operated enlargers and are essentially "automated high-speed enlargers" (Tr. 129, 279–80, 302). Accordingly, the imports fall within the *eo nomine* provision for enlargers in item 722.18.

Plaintiff also seeks to exclude these imports from the common meaning of "enlarger" under the "more than" doctrine. That doctrine was succinctly articulated in *Robert Bosch Corp.* v. *United States,* 63 Cust. Ct. 96, 103, C.D. 3881 (1969):

> The principle is well settled that where an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute * * *. *By contrast where the difference is in the nature of improvement or amplification, and the essential character is preserved or only incidentally altered, the applicable rule is * * * that an unlimited eo nomine statutory designation includes all forms of the article in the absence of a contrary legislative intent or commercial designation.* [Citations omitted; emphasis added.]

And as observed in *United States* v. *Texas Instruments,* 67 CCPA 57, 63, C.A.D. 1243, 620 F.2d, 269, 271–272 (1980):

> Only the most general of rules can be ascertained from the previous decisions dealing with the "more than" doctrine, and it appears that each case must in the first analysis be determined on its own facts. *E. Green & Son (New York), Inc.* v. *United States,* 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971) * * *.

In *Green, supra,* the Appellate Court further observed, 59 CCPA at 34:

> * * * In order to determine if an article is more than that provided for in a particular tariff provision, it is necessary to ascertain the common meaning of the tariff provision and compare it with the merchandise in issue.

See also Ozen Sound Devices v. *United States,* 67 CCPA 67, C.A.D. 1246, 620 F.2d 880 (1980); *The Englishtown Corporation* v. *United States,* 64 CCPA 84, C.A.D. 1187, 553 F.2d 1258 (1977).

Plaintiff's "more than" argument is predicated on various differences pointed out by its witnesses between prototype hand-operated enlargers and the automated Durst printers. Notwithstanding these differences, the court must observe the well settled rule that merchandise is to be classified on the basis of its primary design, construction and function. *See e.g. Asea, Inc.* v. *United States,* 7 CIT 128, Slip Op. 84-28, 587 F. Supp. 1072 (March 29, 1984), *aff'd* 3 CAFC ——, 748, F.2d 676 (1984); *United States* v. *Oxford International Corp.,* 62 CCPA 102, C.A.D. 1154, 517 F.2d 1374 (1975); *Trans-Atlantic Company* v. *United States,* 60 CCPA 100, C.A.D. 1088, 471 F.2d 1397 (1973).

The record is replete with testimony demonstrating that Durst printers have the same primary design, construction and function as prototype enlargers:

An enlarger's primary function is to produce photographic enlargements referred to as "prints"; a Durst printer has the same primary function and its end product is also referred to as a "print." An enlarger and a Durst printer, in addition to performing the same function, are utilized at the same point in the process of producing photographs from negatives. An enlarger enlarges the image on a photographic negative by projecting a light through a photographic lens onto photosensitive positive paper; a printer operates in the same manner and in fact uses the same paper as that used in an enlarger. In a Durst printer, the negative is placed between the light source and the lens, as it is in an enlarger. The lens in a Durst printer and in an enlarger is located between the negative and positive paper. A Durst printer and an enlarger have a negative carrier and also an easel or similar device that holds the photosensitive paper. A Durst printer and an enlarger have a mechanism for holding the elements at an exact designated distance from each other.

In an enlarger, the printing process takes place in the dark; in a Durst printer, the printer process also takes place in the dark, *viz.,* within an enclosed box.[4] If the printing process in either an enlarger or a Durst printer were exposed to light (other than from the machine itself) during operation, the image on the print would be totally exposed and the print ruined. The end product produced by

---

[4] As previously noted, Durst printers are loaded with photosensitive paper under darkroom conditions.

an enlarger contains a latent image that is not visible until after the print undergoes chemical processing to produce a viewable photograph; the same is true of prints produced by a Durst printer.

Plaintiff seeks to differentiate the imports from enlargers, for Customs classification purposes, on the basis of what essentially amounts to a trade-off between the automated and relatively high-speed printing characteristics of the imports[5] and the flexibility characteristic of traditional enlargers in controlling and manipulating the appearance of the prints, *e.g,* dodging, burning in and cropping.[6] On the basis of their *primary* design, construction and function, however, the imports are nothing more or less than automated high-speed photographic enlargers (Tr. 129, 302), as claimed by defendant. The facts that a traditional or prototype hand-operated enlarger is not used for high production printing, has controls to move the head and bellows, uses a blended light in a single exposure for each print rather than a triple exposure utilizing different colored lights, is used under darkroom conditions, requires a skilled operator and may produce special lighting effects, do not exclude the imports from the common meaning of the term "enlarger" (Tr. 324–25).

The further fact that Durst printer have a built-in paper transport ("roll easel")[7] does not make them more than enlargers since enlargers, by definition, customarily posses an easel or similar device for holding or carrying the photosensitive paper (Tr. 130). *See McGraw-Hill Encyclopedia of Science & Technology, supra.* Plainly, the *built-in* easel of the Durst printer is an integral part of the machine (Tr. 229), and is subordinate and incidental to its function of producing enlargements or prints. The court is far from persuaded that the built-in easel of Durst printers makes them combination articles, as contended by plaintiff, or that the easel gives the printers a use that is not possessed by enlargers. *Cf. Simon Omega, Inc.* v. *United States,* 83 Cust. Ct. 14, C.D. 4815 (1979) (phototypesetting machines capable of photographic enlargement incidental to their typesetting use, held more than simply "enlargers" within the purview of item 722.18, TSUS).

---

[5] The speed of the subject printers ranges from approximately 200 to 500 prints per hour (Tr. 30).

[6] "Dodging" is a technique whereby light is "held back" from a certain portion of a print during exposure, while the remainder of the print is being exposed (Tr. 147). "Burning in" is a technique whereby light is concentrated on a particular portion of a print while being "held back" from the rest of the print. Both dodging and burning in are specialized methods of manipulating the appearance of the final print (Tr. 148).

"Cropping" is a technique whereby a print is overmagnified so that a print smaller than the overmagnification can be produced. It is a method of eliminating undesired portions of the original print (Tr. 100–01). The record shows that cropping can be accomplished with some Durst printers, *viz.* the M 6/12 automatic cropping printer (Tr. 22-23) and ACS 78 MK2 cropping printer (Tr. 24), which is the high speed version of the Durst Miniprinter (Tr. 25). As in the case of a prototype enlarger, these Durst cropping printers are used for cropping with the aid of an operator (Tr. 92–93).

[7] A "roll easel" is a means of automatically moving the photosensitive paper (Tr. 186–87). It is noted that Durst printers have a built-in easel rather than an accessory easel, which is a separate piece of equipment that can be moved around from one enlarger to another (Tr. 187–88).

151-377 O - 86 - 3

Commercial Designation

Plaintiff's main thrust is that in the photographic industry the term enlarger does not encompass "printers". Therefore, the court now considers plaintiff's argument that the tariff provision for photographic enlargers in item 722.18 must be construed in accordance with a "commercial designation"—a special interpretation commonly placed upon it by the particular industry involved—rather than common meaning.

Implicit in plaintiff's reliance upon the doctrine of "commercial designation" is the premise that the trade understanding of the tariff term in issue differs from its common meaning. Stated otherwise, the doctrine has no application where the commercial and common meanings are the same. *Stephen Rug Mills* v. *United States,* 32 CCPA 110, C.A.D. 293 (1944); *Draeger Shipping Co.* v. *United States,* 15 Ct. Cust. Appls. 190, T.D. 42234 (1927). Hence, as pointed out in *Excelsior Import Associates, Inc.* v. *United States,* 66 CCPA 1, 2, C.A.D. 1212, 583 F.2d 513, 514, (1978):

> * * * The well-established rule respecting trade sense is that "before the plain understanding of a term can be deviated from it must be shown by plenary proof to have a different import in trade and commerce." *United States* v. *Wells Fargo & Co.,* 1 Ct. Cust. Appls. 158, 161, T.D. 31211 (1911). The Government relied on the plain understanding of the term "ornamented" articles. Thus, appellant had the burden of proving that "ornamented" textile articles, as used in the TSUS, had a *commercial designation or trade sense different from the common meaning or plain understanding of that phrase* * * *. [Emphasis added.]

In *Wells Fargo,* cited in *Excelsior,* the court further expounded upon commercial designation (1 Ct. Cust. Appls. at 161–62):

> It is a rule of statutory interpretation, confined not alone to the customs laws, but running through the universal scope of law, the "words and phrases are assumed to be used in their natural signification" and shall be so construed, the sole exception in customs adjudication being that commercial designation shall obtain over the common and accepted understanding of words where such is duly proven * * *
>
> * * * * * * *
>
> The legitimate corollary of this often-pronounced rule of interpretation is that no meaning shall be given a word or phrase used in customs laws other than its ordinary or accepted meaning *except upon plenary proof that this extraordinary meaning is fully and completely understood and accepted throughout the United States by all of those dealing wholesale in that class of goods.*
>
> The rule is based upon the sound principle that customs laws are drawn in view of the lay understanding (first) of the trade subject thereto, and (secondly) for the information of merchants and dealers who are not lawyers, and perchance may

> not be skilled in the finesse of the English language and who, with a common lay understanding, will be completely informed by the plain words of the statute as drawn by Congress what duties are levied and what penalties they may expect for a violation of the law. [Emphasis added.]

While it is basic that tariff terms presumably carry the meaning given them in trade and commerce (*Ameliotex, Inc.* v. *United States,* 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977): *Esco Manufacturing Co., aka J. Hofert Co.* v. *United States,* 63 CCPA 71, C.A.D. 1167, 530 F.2d 949 (1976)), it is also well settled by a long line of decisions that the language of commerce is presumptively that language in common use. See *e.g., Rosenblad Corp.* v. *United States,* 49 CCPA 81, C.A.D. 800 (1962); *United States* v. *C.J. Tower & Sons of Buffalo, N.Y.,* 48 CCPA 87, C.A.D. 770 (1961); *Floral Arts Studio* v. *United States,* 46 CCPA 21, C.A.D. 690 (1958); *United States* v. *The Specialty House, Inc.,* 42 CCPA 136, C.A.D. 585 (1955); *United States* v. *E. Dillingham, Inc.,* 41 CCPA 221, C.A.D. 555 (1954); *C.J. Tower & Sons* v. United States, 41 CCPA 195, C.A.C. 550 (1954); *Hummel Chemical Co.* v. *United States,* 29 CCPA 178, C.A.D. 189 (1941); and *United States* v. *M.J. Brandenstein & Co.,* 17 CCPA 480, T.D. 43941 (1930).

Since plaintiff maintains that a special commercial meaning of the term "enlarger" excludes printers, plaintiff necessarily assumed the burden of proof on that issue. *United States* v. *Simon Saw & Steel Co.,* 51 CCPA 33, 38 C.A.D. 834 (1964); *The Specialty House, Inc.,* 42 CCPA at 141. Proof of commercial designation is a question of fact to be established in each case. *Tower & Sons* v. *United States,* 11 Ct. Cust. Appls. 261, T.D. 39080 (1922); *Florsheim Shoe Co., Division of Interco, Inc.* v. *United States,* 71 Cust. Ct. 187, C.D. 4495 (1973); *Daniel Green Shoe Co.* v. *United States (Transworld Shoe Corp., Party in Interest),* 58 Cust. Ct. 7, C.D. 2868, 262 F. Supp. 375 (1967). Commercial designation requires proof of the meaning of a term in the trade at the time of the enactment of the statute. *R.J. Saunders & Co., Inc.* v. *United States,* 49 CCPA 87, 89, C.A.D. 801 (1962); *The Hy-Glow Co.* v. *United States,* 58 Cust. Ct. 481, 486, C.D. 3023 (1967).

Consequently, plaintiff had the burden of establishing that, as used in the photographic industry at the time of the enactment of the Tariff Schedules, the term "enlarger" had a meaning which was general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). *Moscahlades Bros., Inc.* v. *United States,* 42 CCPA 78, 82, C.A.D. 575 (1954); *United States* v. *M. & D. Miller, Inc.,* 41 CCPA 226, 235, C.A.D. 556 (1954); *Nylos Trading Co.* v. *United States* 37 CCPA 71, 73, C.A.D. 422 (1949); *Stephen Rug Mills,* 32 CCPA at 116. Thus, the doctrine of commercial designation "was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been

fully acquainted with the practice at the time the law was enacted". *Jas. Akeroyd & Co.* v. *United States,* 15 Ct. Cust. Appls. 440, 443, T.D. 42641 (1928). *See also United States* v. *Fung Chong Co.,* 34 CCPA 40, 42, C.A.D. 342 (1946); *Heads & Threads, Division of MSL Industries, Inc.* v. *United States,* 60 Cust. Ct. 308, C.D. 3374, 282 F. Supp. 484 (1968).

After careful review of the evidence of record and the legal principles applicable to commercial designation, the court finds that plaintiff failed to adduce any general, definitive and uniform trade understanding for the term "enlarger" that is at variance with the common meaning of the term.

In support of its argument that the imports are not enlargers as that term is commercially understood, plaintiff asserts that they are not called "enlargers" in the photographic trade. But on that score, it should first be pointed out that in plaintiff's own advertising literature and instruction manuals the imports are referred to as "enlarging printers" (plaintiff's exhibits 3 and 7 and defendant's exhibit B, C and D), and they are promoted in the trade as designed to produce "enlargements" or "high quality enlargements" (plaintiff's exhibit 2 and defendant's exhibits A, B and H). Moreover, Durst printers, while not "called" enlargers are "considered" by the professional photographic industry to be enlargers (Tr. 82–83). In any event, even though merchandise is commercially known by a specific name (*viz.,* "printers"), which name differs from a generic tariff description (*viz.,* "enlargers"), is not sufficient to exclude the merchandise from classification under the later designation. *See S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States,* 82 Cust. Ct. 197, 210, C.D. 4802 (1979), and cases cited; *Heads & Threads, supra.*

Plaintiff's Claim Under Item 722.94

Having concluded that the imports are described by the provision in item 722.18 for enlargers, under which they were classified by Customs, the court must consider whether the imports are also described by the provision claimed by plaintiff, *viz.,* item 722.94 covering photofinishing equipment.

Plaintiff's position if that the printers are described by item 722.94 because they are used as photofinishing equipment. The record substantiates that contention. Defendant, however, urges a highly restrictive interpretation of the provision for photofinishing equipment. According to defendant, the printers are not used as photofinishing equipment because the end product of the printer is a latent image contained on unprocessed photographic paper, which must undergo a chemical "finishing" process. This latter process, defendant insists, is photofinishing, and only the devices used to accomplish it are classifiable as photofinishing equipment. Stated otherwise, defendant's position is that only articles or devices which make the latent image visible, or are used in devices

that make the latent image visible, qualify for tariff classification as photofinishing equipment.

The tariff provision for photofinishing equipment is obviously a use provision. Indeed, the record establishes that the production of an enlarged latent image on photosensitive paper from a negative, which is the basic function of enlargers (including Durst printers), is essentially the initial step in "finishing" a photograph. Since this initial step is part of the photofinishing process, the printers by use are photofinishing equipment, as described in item 722.94. Defendant's interpretation, which limits the provision for photofinishing equipment to only those articles involved in the chemical "finishing" process, is unduly restrictive. This is confirmed in 3 *Summaries of Trade and Tariff Information* (1968), Schedule 7, p. 45,[8] wherein the United States Tariff Commission stated:

> Item 722.94 covers miscellaneous photofinishing equipment ranging from small print tongs (for handling prints) and film clips, to a complete film-processing machine.

Relative Specificity

Defendant posits that even assuming Durst printers fall within the provision for photofinishing equipment, they are nevertheless precluded from classification under item 722.94 by the doctrine of relative specificity. The court agrees.

General Interpretative Rule 10(c), TSUS, provides that an imported article which is described in two or more provisions of the tariff schedules is classifiable in the provision that most specifically describes it. This rule has been interpreted to mean that merchandise is classifiable under the tariff provision which is more restrictive and more difficult to satisfy. *Ozen Sound Devices, supra; Arthur J. Humphreys* v. *United States,* 56 CCPA 67, C.A.D. 956, 407 F.2d 417 (1969); *United States* v. *Simon Saw & Steel Co., supra.*

When the competing provisions are an *eo nomine* provision, such as item 722.18 for enlargers, and a use provision with a "not specially provided for" clause, such as item 722.94, the *eo nomine* provision prevails under Rule 10(c). In *Besler,* the Appellate Court stated (64 CCPA at 125):

> Appellees' claimed classification under item 722.94, TSUS, is merely a "not specially provided for" provision for all equipment which is specially designed for still picture photofinishing. It is not a specific *eo nomine* provision, as is the camera provision of item 722.16, TSUS. Absent a clearly shown contrary legislative intent, which is not present in the case at bar, a "not specially provided for" clause in a use provision ex-

[8] The *Summaries of Trade and Tariff Information* have been frequently referred to as an aid in determining the scope of tariff provisions. *See e.g.: Pistorino & Co., Inc.* v. *United States,* 66 CCPA 95, C.A.D. 1227, 599 F.2d 444 (1979); *American Bristle & Hair Drawing Co. et al* v. *United States,* 59 CCPA 104, C.A.D. 1048, 458 F.2d 524 (1972); *Tanross Supply Co., Inc.* v. *United States* 58 CCPA 26, 31, C.A.D. 1000, 433 F.2d 1332 91970). See also *Lyons Export & Import, Inc.* v. *United States,* 59 CCPA 142, 144, C.A.D. 1056, 461 F.2d 830 (1972); *The Englishtown Corporation* v. *United States,* 64 CCPA 84, C.A.D. 1187, 553 F.2d 1258 (1977).

cludes articles enumerated elsewhere by a description or *eo nomine* designation (citations omitted).

Here, plaintiff has not shown a contrary legislative intent to the application of the doctrine of relative specificity. Therefore, pursuant to Rule 10(c), the court holds that the Durst printers are more specifically provided for under the *eo nomine* provision for enlargers in item 722.18, TSUS, than under the "basket" provision for photofinishing equipment in item 722.94, TSUS.

CONCLUSION

For the foregoing reasons, Customs' classification of the Durst printers as "enlargers" under item 722.18, TSUS, is sustained, and this action is dismissed.[9]

Judgment will be entered accordingly.

(Slip Op. 86-36)

HUFFY CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND TAIWAN TRANSPORTATION VEHICLE MANUFACTURERS ASSOCIATION, DEFENDANT-INTERVENOR

Consolidated Court No. 83-8-01180

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Plaintiffs' motion for judgment upon the agency record denied.]

(Decided March 27, 1986)

Collier, Shannon, Rill & Scott (Michael R. Kershow and *Lauren R. Howard* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Velta A. Melnbrencis* on the motion) for the defendant.

Plaia & Schaumberg, Chartered (Herbert C. Shelley, Joel D. Kaufman, and *George W. Thompson* on the motion) for the defendant-intervenor.

CARMAN, *Judge:* Before the Court is plaintiffs' Rule 56.1 motion for judgment upon the agency record challenging the final determination of the United States Department of Commerce, International Trade Administration (ITA) of sales at less than fair value in *Bicycles from Taiwan,* 48 Fed. Reg. 31,688 (1983). Defendant opposes the motion, as does defendant-intervenor Taiwan Transportation Vehicle Manufacturers Association. All parties have submitted comprehensive briefs and the record is quite extensive.

---

[9] While in view of the disposition of this case, it is unnecessary to decide the merits of defendant's proposed alternative classification under the provision for cameras in item 722.16, TSUS, the record shows that the printers fall within *Webster's* broad generic definition of "camera" relied upon by the Appellate Court in *Besler* (Tr. 123, 226-27, 253, 272), which held that the *eo nomine* provision for cameras is more specific than the provision for photofinishing equipment in item 722.94. As with the term "enlarger", plaintiff failed to prove a general, definite and uniform commercial designation for the term "camera" that differs from the common meaning of such term.

The ITA investigated sixteen Taiwanese bicycle manufacturers and found that eleven of them either had no sales of *de minimis* sales at less than fair value. These eleven firms were thus excluded from the ITA's final determination. Plaintiffs argue that these eleven should not have been excluded, and that dumping margins should have been higher as to the remaining five. Plaintiffs claim that the ITA erred in four areas of its determination. Plaintiffis argue that: (1) the ITA improperly adjusted the United States price by adding a 4.71 percent import duty rebate; (2) the ITA improperly adjusted the United States price by adding a 4 percent harbor dues rebate; (3) the ITA should have conducted an investigation of below-cost sales in the home market; and (4) the ITA should have commenced a countervailing duty investigation based on information uncovered in the course of the antidumping investigation. For reasons given below, the agency determination is sustained.

I. *Adjustment to United States Price for 4.71 Percent Import Duty Rebate*

The Tariff Act of 1930 (Act), as amended, requires the assessment of an antidumping duty whenever it is determined that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and such sales injure or threaten injury to an industry in the United States. 19 U.S.C. § 1673 (1982). To determine whether merchandise is sold in the United States at less than fair value, the statute calls for a comparison between the price of the merchandise in the United States and its price in a foreign market (either the home market or a third country, or a constructed price). The statute provides that a duty be assessed based upon that comparison:

> [T]here shall be imposed upon such merchandise an antidumping duty * * * in an amount equal to the amount by which the foreign market value exceeds the United States price * * *.

19 U.S.C. § 1673.

The comparison of the two prices must take into account different circumstances of sale involved in the United States and the foreign market. The Act provides for adjustments to the prices to reflect these differences, ensuring that the final comparison is as free as possible from costs or benefits specific to each market.

Section 772 of the Act, Pub. L. No. 96–39, Title 1, § 101, 93 Stat. 181 (1979) (codified at 19 U.S.C. § 1677a (1982)), describes the method by which the ITA is to arrive at the United States price. The section first describes United States price as "the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a). The section then provides for certain adjustments to the United States price. Relevant here is the adjustment for import duty rebates:

> The purchase price and the exporter's sale price shall be adjusted by being—
>
> (1) increased by—
>
> * * * * * * *
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

19 U.S.C. § 1677a(d)(1)(B). Congress allowed this adjustment because purchasers in the home market presumably must pay the passed on cost of import duties when they buy the merchandise. If the duties are rebated when the merchandise is exported, presumably no similar cost is passed on to purchasers in the United States. By adding the amount of the rebate to United States price this adjustment accommodates the difference in cost to the two different purchasers.

In this case the ITA allowed an upward adjustment in United States price based upon an import duty rebate granted by Taiwan to bicycle producers. The import duty rebate was 4.71 percent of the "domestic value added;" that is, "the difference between the f.o.b. value of the finished bicycle and the c.i.f. value of the components imported directly by the bicycle manufacturers themselves." 48 Fed. Reg. at 31,689. The rebate's purpose was to refund, upon exportation, the import duties that domestic parts manufacturers paid on imported raw materials and passed on to bicycle manufacturers. To arrive at the 4.71 percent rebate, the Taiwanese authority first analyzed the amount of specific imported raw materials in an average bicycle. Referring to the duty rate record for those materials, it calculated the duty paid by Taiwanese parts producers, and presumably passed on to bicycle manufacturers, on an average bicycle. The Taiwanese authority then compared the amount of duty paid on the raw materials in an average bicycle to the domestic value of an average bicycle to arrive at the 4.71 percent rebate amount.

The Taiwanese program is essentially an allocation scheme in which the cost of import duties on raw materials is allocated to each bicycle, based upon that bicycle's domestic content. An allocation of import duties may give rise to an adjustment to United States priced provided import duties are actually paid and rebated, and there is a sufficient link between the cost to the manufacturer (import duties paid) and the claimed adjustment (rebate granted).

This court first established the two-part requirement of actual cost to the manufacturer and sufficient link between that cost and the claimed adjustment in *F.W. Myers & Co.* v. *United States,* 72 Cust. Ct. 219, C.D. 4544, 376 F. Supp. 860 (1974). In that case, this court sustained the ITA's denial of an adjustment to foreign market value for overhead costs under a provision for adjustments for "differences in circumstances of sale." 19 U.S.C. § 161(b)(2)

(1976) (repealed). The manufacturer sought an adjustment for overhead expenses relating to sales in the home market but not the United States market. The court first noted that the manufacturer could not lump overhead costs together with selling expenses in "a stewpot labeled 'differences in circumstances of sale.'" 72 Cust. Ct. at 233, 376 F. Supp. at 872. Instead, the court ruled, a manufacturer must show "that each claimed expense had a reasonably direct effect upon the sales in the market under consideration." *Id.*

The court found further that even had the manufacturers established a link between the alleged costs and the home market sales, it had failed to prove that the costs were actually incurred. The court stated that:

> a basic concept of all value determinations by the court is that they must be based upon proof of *actual* costs or prices—*not* estimates, approximations or averages. Thus, use of percentages in calculating expenses or profits will be rejected if they are not based upon *actual amounts* of expenses incurred or profits added.

Id. at 234, 376 F. Supp. at 873 (citations omitted).

This court again considered an adjustment to foreign market value for differences in circumstances of sale in *Brother Industries, Ltd.* v. *United States,* 3 CIT 125, 540 F. Supp. 1341 (1982), *aff'd sub nom. Smith-Corona Group* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 104 S. Ct. 1274 (1984). The court there upheld an adjustment based upon an incentive rebate that the typewriter manufacturers gave to retailers in the foreign market but not the United States market. The manufacturers based the rebate amounts on total sales, which included merchandise other than the typewriters under investigation, and various models of the typewriters under investigation. Based on the percentage of sales of typewriters under investigation to total sales, and the percentage of each model to the total sales of typewriters, the ITA allocated a cost to the manufacturers for each typewriter sold. The court approved the ITA's method of allocating costs to arrive at the adjustment, stating:

> *F.W. Myers* teaching does not preclude the administering authority from allocating or apportioning *actual* costs among the various items to which they are attributable.

3 CIT at 149, 540 F. Supp. at 1363.

These cases involved adjustments to foreign market value for differences in circumstances of sale.[1] In *Roquette Freres* v. *United*

[1] 19 U.S.C. § 1677b(a)(4)(B) provides that:

> In determining foreign market value, if it is established * * * that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> * * * * * * *
>
> (B) other differences in circumstances of sales
>
> * * * * * * *
>
> then due allowance shall be made therefor.

States, 7 CIT 88, 583 F. Supp. 599 (1984), this court applied the same rule to a case specifically involving an adjustment to United States price based on import duty rebates. In that case, the European Economic Community (EEC) levied a duty on corn imports, and granted an "export restitution payment" on exported products containing corn. The ITA determined that this payment was not allowable as an adjustment under 19 U.S.C. § 1677a(d)(1)(B):

> The "import levy" and the "export restitution payments" are not directly linked to, or dependent upon, one another within the context of EC regulations. The exporters may receive these payments regardless o[f] whether or not they imported corn and paid the "import levy."

Sorbitol From France, 47 Fed. Reg. 6,459, 6,460 (1982). This court affirmed the ITA's determination in *Roquette Freres,* 7 CIT 88, 583 F. Supp. 599 (1984), agreeing that the rebates were not directly related to the firm's payment of import duties.

> Whenever a French manufacturer exports a product containing corn, the aforecited EC regulation provides for the payment of an export refund regardless of (1) whether or not the firm used imported corn, and (2) whether or not the firm paid any import levies.

7 CIT at 91, 583 F. Supp. at 602.

The court thus applied the rule for adjustments based on differences in circumstances of sale to adjustments for import duty rebates. As applied in this context, the rule is that the import duty must actually have been paid and rebated (or waived), and there must be a sufficient link between the payment and the rebate.

The ITA determined that both these conditions were satisfied by the Taiwanese rebate program. *See* 48 Fed. Reg. at 31,690. Although the Court will defer to the agency's expertise in these technical areas, the Court must still carefully review the agency's determination, under the appropriate standard, to ensure that it conforms to statutory requirements. *Rhone-Poulenc, S.A.* v. *United States,* 8 CIT 47, 592 F. Supp. 1318, 1334 (1984). This Court will uphold the ITA's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Plaintiffs contend that the ITA's final determination, based in part on an adjustment to United States price for import duty rebates, is unsupported by substantial evidence because there is no evidence in the record that domestic parts producers paid any import duties on raw materials, nor is there evidence that the 4.71 percent rebate is linked to actual payment of import duties.

The only evidence in the record that supports the ITA's conclusion that Taiwanese bicycle parts producers actually paid import duties and that the payment of those duties is directly linked to the 4.71 percent import duty rebate granted bicycle manufacturers

is the Taiwanese authority's general description of how it arrived at the rebate amount. *See* Record at 946–48. There is no further evidence showing actual payment by parts producers or import duties or amount of raw materials actually imported, nor is there further evidence showing the quantity of raw materials actually contained in an average bicycle. Thus the Court must determine whether the assertion of the Taiwanese authority that import duties were actually paid and that there is a direct link between their payment and the 4.71 percent rebate is sufficient to support the ITA's finding that those facts existed.

The "substantial evidence" standard of review has been well explicated by this court in prior decisions. *See, e.g., Carlisle Tire and Rubber Co.* v. *United States,* 9 CIT ——, 622 F. Supp. 1071 (1985). It is "essentially a limited review of the agency determination, insuring that agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole." *Alhambra Foundry* v. *United States*, Slip Op. 85–130, at 6 (December 30, 1985). While the Court might draw a different conclusion from the evidence in the record, the applicable standard of review does not permit the Court to substitute its judgment for that of the agency. The record contains a general description of the Taiwanese rebate program, provided by the Taiwanese authority. The ITA accepted this as evidence that import duties actually were paid by domestic parts producers and accurately allocated to export bicycles. The Court finds that the Taiwanese authority's description of the plan was sufficient evidence from which the ITA could reasonably draw this conclusion.

Plaintiffs further contend that the 4.71 percent import duty rebate is actually a countervailable subsidy and the Congress did not intend dumping margins to be decreased by adjustments based upon countervailable subsidies.[2] Plaintiffs note that Congress intended the antidumping and countervailing duty statutes to work together; for example, the antidumping statute provides an adjustment to United States price in the form of an addition for countervailing duties imposed. *See* 19 U.S.C. § 1677a(d)(1)(D) (1982). It would defeat the purpose of the countervailing duty law, plaintiffs argue, if we allow an addition to the United States price for a rebate program that constitutes a countervailable subsidy.

To support their argument, plaintiffs point out that 19 U.S.C. § 1677a(d)(1)(C) provides an adjustment for tax rebates only if the tax is one directly upon the merchandise, that is, a so-called "indirect" tax. The Court of Customs and Patent Appeals found that relief from "indirect" taxes does not amount to a countervailable subsidy, while relief from "direct" taxes—those imposed on the producer rather than the merchandise—does amount to a countervailable subsidy. *American Express Co.* v. *United States,* 60 CCPA 86,

[2] Plaintiffs make the same argument with regard to the harbor dues rebate.

C.A.D. 1087, 472 F.2d 1050 (1973). The legislative history of 19 U.S.C. § 1677a(d)(1)(C) indicates that Congress consciously intended that tax remissions that constituted countervailable subsidies should not be used to reduce dumping margins. *See, e.g.,* Hearings on H.R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. 135 (1973) (White House report).

Plaintiffs reason that if Congress did not intend such direct tax rebates to reduce dumping margins, it also must not have intended to reduce dumping margins by allowing an adjustment for import duty rebates that constitute countervailable subsidies. This reasoning is not persuasive. First, the distinction between direct and indirect taxes is more easily made than the distinction between an import duty rebate that is or is not a countervailable subsidy. More critically, however, Congress did make the distinction between subsidy and non-subsidy tax rebates is section 1677a(d)(1)(C) but made no such distinction regarding import duty rebates in section 1677a(d)(1)(B). The conclusion that must be drawn is *not* that Congress intended the same restriction to apply in the latter section, but rather that it *did not intend* it to apply.

Moreover, there are further reasons the court and the ITA should refrain from making a subsidy determination in the context of a dumping investigation. The determination of whether a countervailable subsidy exists is a complex one and Congress has provided a separate set of guidelines for the inquiry. In a dumping investigation the ITA is not seeking the same information or asking the same questions it would in a countervailing duty investigation. For this Court to disallow an adjustment to third country price because the import duty rebate is allegedly a countervailable subsidy would be to bypass the countervailing duty statute and essentially penalize the Taiwanese exporters without allowing them an opportunity at the agency level to have a full hearing on whether the rebates are a subsidy.[3]

II. *Harbor Dues Rebate*

Taiwan assesses a four percent *ad valorem* amount on all dutiable imports, termed "harbor dues." These dues are assessed on bicycle parts directly imported by bicycle manufacturers. Upon the export of completed bicycles containing imported parts, these dues are rebated. The ITA allowed an adjustment to United States price for this rebate under 19 U.S.C. § 1677a(d)(1)(B).

Plaintiffs contend that the ITA should not have added the four percent harbor dues rebate to the United States price. Plaintiffs argue first that the harbor dues represent a tax and not an import duty and that therefore the ITA should have conducted an investigation as required in section 1677a(d)(1)(C).[4] That section allows an

[3] Plaintiffs also contend that while no adjustment should be made to United States price based on the import duty rebate, such an adjustment should be made to third country price. Because the Court finds that the adjustment to United States price was proper, it need not address this contention.

[4] 19 U.S.C. § 1677a(d)(1)(C) (1982), provides:

Continued

adjustment to United States price for rebates of indirect taxes, but only if the ITA finds that the cost of the tax is actually passed on in the home market.

In its determination, the ITA stated:

> Whether the [harbor dues] assessment is considered a "tax" or "duty" is immaterial to the outcome of this investigation. If we treat the assessment as a tax, we would add the rebate to the United States price only to the extent that the tax is reflected in home market price. In this case, harbor dues would be included in the home market price.

48 Fed. Reg. at 31,690. The government continues this theme in its brief, in which it suggests that tax assessments are always passed on in the home market price and therefore their rebate always constitutes a proper adjustment to United States price. If this were true, then the statute's requirement that these rebates create an adjustment only to the extent the cost of the tax is passed on would be meaningless. Statutes should be interpreted in such a way that their parts are harmonized and no part is rendered meaningless. *See Beaver Products Co.* v. *United States,* 17 CCPA 434, 437, T.D. 43878 (1930). Congress included a special requirement in section 1677a(d)(1)(C) that it did not put in section 1677a(d)(1)(B). We must conclude that Congress recognized that not all taxes are passed on to the home market, and therefore required some showing that such a tax is passed on before its rebate could be the source of an adjustment.[5] To support an adjustment for a tax rebate there must be substantial evidence in the record to support the conclusion that the tax was passed on to the home market.

It is therefore material whether the harbor dues assessment in this case is a tax or an import duty. Plaintiffs contend that it is a tax because its ultimate purpose is to finance harbor services, which the government provides. In its determination, the ITA found that the ultimate purpose for which the assessments were used was not relevant to the issue of whether they were taxes or import duties. The ITA found that the dues assessment was an import duty because (1) it was "assessed in conjunction with other duties and administered in the same manner" and (2) it was not levied on duty-free merchandise.

> The purchase price and the exporter's sales price shall be adjusted by being—
>
> (1) increased by—
>
> * * * * * * *
>
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation * * *

[5] The House report on the amendment creating the adjustment supports this conclusion:

> [A]n adjustment for such [indirect] tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased.

H.R. Rep. No. 571, 93d Cong., 1st Sess. 69 (1973).

Generally, this court will defer to agency findings in areas where the agency has a particular expertise. In this case, the ITA determined that the harbor dues assessment was an import duty rather than a tax. The ITA provided objective criteria to support its determination. Such objective criteria are important in developing the law and providing guidance to future petitioners.[6] The Court finds that the ITA's determination that the harbor dues are an import duty is supported by substantial evidence on the record. Congress apparently did not intend rebates that are countervailable subsidies to reduce dumping margins; nevertheless, under section 1677a(d)(1)(B) an adjustment must be allowed unless a countervailing duty assessment is made under the appropriate statute and procedures.

III. *Failure To Conduct an Investigation of Below Cost Sales in the Home Market.*

The ITA declined to conduct an investigation of below cost sales in the home market because:

> Petitioners have not provided a credible basis for suspecting that substantial quantities of bicycles sold in the home market or to third countries have been made at prices which are less than the cost of production.

48 Fed. Reg. at 31,691.[7] This determination is not in accordance with the statutory requirement and places a higher burden upon the petitioner than the statute mandates. Section 773(b) of the Tariff Act of 1930 provides:

> *Whenever the administering authority has reasonable grounds to believe or suspect that sales* in the home market of the country of exportation, or, as appropriate, to countries other than the United States, *have been made* at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—
>
> (1) have been made over an extended period of time and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,
>
> such sales shall be disregarded in the determination of foreign market value.

---

[6] In a previous determination, the ITA concluded that this same assessment was a tax rather than an import duty and applied section 1677a(d)(1)(C). *Motorcycle Batteries from Taiwan*, 47 Fed. Reg. 9,264, 9,265 (1982). That determination is not now before the Court, nor does it necessarily establish a settled law with respect to this particular assessment. The Court notes, however, the importance of consistency in ITA determinations.

[7] Defendant in its brief also maintains that the petitioner's request for the investigation was untimely, although the agency made no such finding in its determination. Because of the Court's disposition of this issue, it does not decide whether a request for such an investigation is untimely if it is made, as here, within 62 days of the date on which the final determination is statutorily due. The Court notes, however, that in *Connors Steel Co. v. United States*, 2 CIT 242, 527 F. Supp. 350 (1981), *modified*, 3 CIT 79, 566 F. Supp. 1521 (1982), this court found that 51 days were sufficient.

19 U.S.C. § 1677b(b) (emphasis added). The statute requires only a showing that sales have been made at below cost, not substantial sales. It is for the agency to investigate and determine whether substantial sales were made.

In reviewing the record, however, the Court concludes that even if the appropriate statutory standard is applied, plaintiffs failed to present to the ITA sufficient evidence to create reasonable grounds to believe or suspect that sales were being made at below cost in the home market. Plaintiffs alleged that certain of the manufacturers sold bicycles in the United States at a significantly higher price than in the home market. Plaintiffs further alleged that a comparison of this information with the overall operating performance of each manufacturer indicates that the manufacturers would have had to sell the bicycles in the foreign market at less than the cost of production. Essentially, plaintiffs' argument is that when financial statements reveal an operating loss, the conclusion must be that merchandise is being sold at less than the cost of production. Operating losses, however, may be caused by a variety of factors which do not relate to that year's cost of production. For example, bad management or large capital investment that is not amortized could result in the showing of a loss or very small profit. Operating losses are not necessarily tied to actual sales, and may be realized if there are no sales at all. Moreover, as the ITA noted in its determination, "financial statements often reflect accounting adjustments which can distort operating performance significantly." 47 Fed. Reg. at 31,691.

IV. *Failure To Conduct a Countervailing Duty Investigation*

Plaintiff contends that during the course of its antidumping investigation, the ITA uncovered evidence of the existence of countervailable subsidies. Plaintiff argues that 19 U.S.C. § 1677d (1982) requires the ITA to investigate the potential subsidies in such a case. In its brief, however, plaintiff relies on only a portion of the statute. The statute provides in full:

> If, in the course of an investigation under this subtitle, the administering authority discovers a practice which appears to be a subsidy, *but was not included in the matters alleged in a countervailing duty petition*, then the administering authority—
>
> (1) shall include the practice in the investigation if it appears to be a subsidy with respect to the merchandise which is the subject of the investigation, or
>
> (2) shall transfer the information concerning the practice (other than confidential information) to the library maintained under section 1677f(a)(1) of this title, if the practice appears to be a subsidy with respect to any other merchandise.

19 U.S.C. § 1677d (1982) (emphasis added). Read as a whole, the statute appears to contemplate an investigation of one type of sub-

sidy in which the agency uncovers another type of subsidy.[8] The Court therefore finds that the ITA properly rejected plaintiffs' request that it conduct a countervailing duty investigation.

CONCLUSION

The final determination of the ITA regarding bicycles from Taiwan is affirmed because it is supported by substantial evidence in the record and is in accordance with law.

(Slip Op. 86-37)

BRITISH STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS AND ALLEGHENY LUDLUM STEEL CORP., ET AL., DEFENDANTS-INTERVENORS

Court No. 83-7-01032

Before BERNARD NEWMAN, *Senior Judge.*

REVIEW OF INTERNATIONAL TRADE ADMINISTRATION'S RESULTS OF REMAND PROCEEDINGS ON AGENCY RECORD PURSUANT TO RULE 56.1—STAINLESS STEEL PLATE FROM THE UNITED KINGDOM

Plaintiffs challenge the Results of Remand of the Department of Commerce, International Trade Administration (ITA), which determined that the British government's equity infusions into British Steel Corporation in fiscal year (FY) 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i) and therefore constituted countervailable subsidies. According to plaintiffs, ITA's "reasonable investor" criterion for applying the term "commercial considerations" is irrelevant. Additionally, plaintiffs contest the revised valuation methodologies ITA utilized on remand allocating the benefits of the equity infusions over a 15-year period, representing the average useful life of capital assets in domestic integrated steel mills. Plaintiffs contend that in valuing the subsidies ITA should have applied generally accepted accounting principles, which would require that the benefits of the equity infusions be recognized ("expensed") solely in the year of receipt; and that the loan forgiveness must be amortized at the existing fixed interest rate over the remaining term of the loan.

HELD: The court affirms ITA's determination that the British government's equity infusions in FY 1977/78 were made "on terms inconsistent with commercial considerations" predicated on the "reasonable investor" test.

However, the court finds that ITA's revised valuation methodologies are unsupported by substantial evidence and contrary to law because they fail to reflect the commercial and competitive benefit of the subsidies to the recipient, which Congress intended to be the measure of the value of countervailable subsidies. But, the court rejects plaintiffs' contention that the benefits of the equity infusions must be expensed in the year of receipt in accordance with generally accepted accounting principles. The court agrees with plaintiffs' contention respecting the loan forgiveness.

The action is remanded to ITA for reconsideration of its valuation methodologies and recalculation of the benefits of the British government's equity infusions.

---

[8] The legislative history of this provision supports this interpretation:

> Under section 775 of the Tariff Act of 1930, as added by section 101 of the bill, if, in the course of a countervailing duty investigation under Title VII of the Tariff Act * * * the administering authority discovers a practice which appears to be a subsidy but was not included in the matters alleged in the countervailing duty petition, then it must include the practice in the ongoing investigation * * *

S. Rep. 249, 96th Cong., 1st Sess. 97, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 483.

[ITA's Results of Remand affirmed in part; remanded in part.]

(Decided March 31, 1986)

Steptoe & Johnson (*Richard O. Cunningham, Charlene Barshefsky, William L. Martin II* and *Neil R. Ellis, Esqs.*, of counsel) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Sheila N. Ziff, Esq.*, for defendants.

Collier, Shannon, Rill & Scott (*David A. Hartquist* and *Paul C. Rosenthal, Esqs.*, of counsel) for defendants-intervenors.

BERNARD NEWMAN, *Senior Judge:*

INTRODUCTION

The central issue presented, having significant international trade implications for foreign governments that make "equity infusions" in state-owned enterprises in poor financial health, is: Under what circumstances are such companies "uncreditworthy" thereby making the government's investments commercially unreasonable and hence countervailable subsidies under 19 U.S.C. § 1677(5)(B)(i). On this vital aspect of the case, the present opinion is a sequel to the court's previous decision, *British Steel Corporation* v. *United States,* 9 CIT ——, Slip Op. 85-26, 605 F. Supp. 286 (March 8, 1985), remanding the action to the United States Department of Commerce, International Trade Administration (ITA) for further proceedings, discussed below. Of transcendent importance in this case are the methodologies used by ITA on remand in valuing the alleged subsidies.

This court's decision of March 8, 1985 sustained ITA's final affirmative countervailing duty determination regarding stainless steel plate from the United Kingdom, 48 Fed. Reg. 19048, April 27, 1983 (Final), finding that the British government's equity investments in British Steel Corporation (BSC) from fiscal year (FY) 1978/79 to FY 1981/82 constituted countervailable subsidies within the meaning of 19 U.S.C. § 1671. However, pursuant to the Government's request (and over plaintiff's opposition), this action was remanded to ITA for: (1) redetermination of whether the equity infusions during FY 1977/78 [1] constituted countervailable subsidies; (2) supplementation of the administrative record with all information obtained and/or utilized by ITA in making its determination relative to the creditworthiness of BSC in FY 1977/78; (3) revaluation and recalculation of the subsidies affected by ITA's new methodologies described in the "Subsidies Appendix" to the Final Affirmative Countervailing Duty Determinations and Countervailing Duty Order in *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina,* 49 Fed. Reg. 18006, 18016 (April 26, 1984) (Final).

On September 9, 1985 ITA transmitted to this court its Results of Remand Proceedings ("Remand Results"), in which ITA deter-

[1] BSC's FY ends on March 31st. Thus, FY 1977/78 encompasses the period April 1, 1977 through March 31, 1978.

mined: (1) equity infusions by the British government in FY 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i), and consequently, constituted countervailable subsidies; and (2) the benefits from the equity infusions during FYs 1977/78 to 1981/82 should, irrespective of the actual use of the funds, be amortized over a fifteen year period, representing the average useful life of renewable physical assets in the domestic steel industry.[2]

Oral argument was heard pursuant to plaintiffs' motion on March 11, 1986; at the conclusion, the court reserved decision.

Presently before the court is plaintiffs' motion under Rule 56.1 for judgment on the agency record in connection with the foregoing Remand Results. Seeking reversal and further remand, plaintiffs contend that the following aspects of ITA's Remand Results are unsupported by substantial evidence and otherwise not in accordance with law: (1) ITA's finding that the British government's equity infusions in BSC during FY 1977/78 were inconsistent with commercial considerations; (2) ITA's fifteen-year allocation period for amortizing the benefits associated with subsidy funds used for certain purposes other than acquisition of long-lived assets; and (3) ITA's methodology for calculating the benefits associated with the British government's loan forgiveness to BSC.

Defendants and intervenors have responded seeking affirmance of the Remand Results.

The Commercial Reasonableness of the British Government's Equity Infusions in BSC in FY 1977/78

Initially, the court addresses ITA's reevaluation of the commercial reasonableness of the British government's equity infusions in BSC in FY 1977/78.

Section 771(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5), embraces any subsidy "bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise" including: "[t]he provision of capital, loans or loan guarantees *on terms inconsistent with commercial considerations*" (emphasis added). In Slip Op. 85-26, this court construed the "commercial considerations" test concluding that an investment is consistent with commercial considerations if a reasonable investor could expect a reasonable rate of return on his investment within a reasonable period of time. Slip Op. 85-26 at 16. In its earlier decision, this court reviewed the financial history of BSC and found that for FYs 1978/79 through 1981/82, "given BSC's deteriorating financial condition and precarious situation, no private sector investor expecting a reasonable return on his investment within a reasonable time would have given any consideration whatever to investing in BSC during the period of its restructuring." *Id.* at 16. On remand,

[2] The Remand Results have not been published in the Federal Register.

ITA applied the same "reasonable investor" criterion in determining whether the British government's equity infusions in FY 1977/78—the year at issue in the present review—were "inconsistent with commercial considerations" within the meaning of the statute.

In reevaluating the commercial reasonableness of the equity infusions by the British government during FY 1977/78, ITA reviewed BSC's financial history, commencing with its establishment in 1967. The review covered such fundamental indicia of financial condition as net income of BSC, net income before interest and taxes, cash flow from operations, coverage of interest expenses, return on equity, return on sales and current assets and liabilities.

ITA also considered such additional pertinent factors as the substantial cost of forming BSC, leading to unfavorable financial results for the first few years of the company's existence; the enormous social costs borne by BSC because of the British government's policy decisions, such as keeping high-cost plants open to preserve jobs; BSC's massive losses; the extremely bleak prospects of the company expressed by its own chairman in BSC's 1976–77 annual report; and the dismal outlook for the world steel market in general.

Based on its analysis of the foregoing factors, ITA reached the following conclusion:

> After considering the results for fiscal years 1975–76 and 1976–77 and the outlook for the world steel market in general, a reasonable investor in 1977 would not have considered British Steel with its large losses, poor return on equity, and other signs of structural problems, to be a reasonable commercial investment.

Record on remand, document 1 at 7.

The court finds substantial evidence in the record of the bleak financial condition of BSC in FY 1977/78 and the precariousness of any expectation of future profitability. If ITA's application of the statutory expression "commercial considerations" is reasonable and not in conflict with the expressed intent of Congress, such interpretation is entitled to the traditional deference courts pay to agency interpretation. *Board of Governors, FRS* v. *Dimension Financial Corp.*, —— U.S. ——, 106 S. Ct. 681, 686 (1986); *United States* v. *Riverside Bayview Homes*, —— U.S. ——, 106 S. Ct. 455, 461 (1985); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U.S. ——, 105 S. Ct. 1102, 1108 (1985); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. ——, 104 S. Ct. 2778, 2881–83 (1984) and *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). *See also American Lamb Company* v. *United States*, 4 CAFC ——, —— F.2d —— (Appeal No. 86-560, decided February 28, 1986); *Smith Corona Group, Consumer Products Division, SCM Corp.* v. *United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1274 (1984); and *Consumer Products*

Division, SCM Corp. v. *Silver Reed America,* 753 F.2d 1033, 1039 (Fed. Cir. 1985). Furthermore, it is a cardinal principle that "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judical proceeding". *Chevron, U.S.A., Inc.,* 104 S. Ct. at 2782 n. 11. *See also Chemical Manufacturers Association,* 105 S. Ct. at 1108; and *Consumer Products Division,* 753 F.2d at 1039.

Plaintiffs argue that ITA's "reasonable investor" test is irrelevant to the commercial reasonableness of the British government's equity infusions and contrary to law. According to plaintiffs, the British government, unlike an outside investor, could not simply abandon BSC and incur no further losses if it decided to close the firm, and therefore the steps the British government took as the sole investor in the corporation were reasonably taken to minimize its prospective losses. In short, plaintiffs contend that the overall operating results and financial ratios of a loss-incurring company are irrelevant to the issue of whether the British government's equity infusions were inconsistent with commercial considerations within the purview of the statute.

The nub of the dispute between the parties concerns the interpretation of the term "commercial considerations"—specifically, whether the statutory indicium of a subsidy prescribed by section 1677(5)(B)(i) permits ITA to assess the British government's equity infusions in BSC in FY 1977/78 from the standpoint of the reasonable outside investor, as claimed by defendants and intervenor. In essence, ITA considered whether a reasonable investor seeking to make a sound investment would have invested in BSC during the period in question given BSC's history, financial status and the outlook for the steel industry in general at that point in time. As stated by ITA (record on remand, document 1 at 23–24):

> When determining whether an equity investment is consistent with commercial considerations, the Department first looks for the value of the stock as determined by the market place. To the extent that a government procures stock at a market price, there is no subsidy. If a government pays a premium price for the shares, its investment is inconsistent with commercial considerations. When a firm's shares are not traded publicly, there is no market-determined price. Therefore, the Department must rely on information available to it that would be available to an investor at the time of the investment as a means of determining the commercial reasonableness of investments in the company.
>
> Such an investor will study the company's financial statements to assess the company's current health and past performance. To get an idea of what events and decisions underlie these financial results, as well as to understand management's views of the company's goals and future prospects, an investor

will also examine carefully the other information contained in the company's annual reports. Then, to evaluate the company's prospects in a wider context, an investor will consider any available independent studies and forecasts of the industry in general.

In connection with the instant litigation, BSC commissioned an economic analysis by Dr. Joseph W. McAnneny of Economists, Incorporated (record on remand, document 7 (non-confidential version)).[3] Predicated on his analysis, Dr. McAnneny submitted the following arguments concerning ITA's methodology:

First, based on application of ITA's reasonable investor test to six integrated U.S. steel producers with unfavorable operating results in 1981–84, McAnneny would expect to find that none of these companies were able to attract capital. Yet, during the period 1981–84, all the producers raised debt and equity capital in significant amounts.

Second, ITA has created a *per se* rule—that continued investment in a failing company for any reason is inconsistent with commercial considerations—which rule conflicts with observed market behavior where frequently corporations reorganize around their profitable assets, rather than terminate all productive facilities.

Finally, ITA's reasonable investor test focuses primarily on recent and current financial performance to the exclusion of other relevant data, and neglects to consider possible remedies that a firm might take to reposition itself in a market or reduce operating costs and restore profitability.

In view of the foregoing shortcomings of ITA's test, as perceived by McAnneny, he proposes an alternative standard for determining whether investment in a loss-incurring corporation is inconsistent with commercial considerations. Specifically, McAnneny proposes application of two tests:

(1) The corporation should continue to operate (and the investor should continue to cover operating losses) for facilities where revenues exceed the variable costs of production and make some contribution to coverage of fixed expenses. Predicated on this test, plaintiffs maintain that the term "commercial considerations" permits ITA to assess the commercial reasonableness of equity infusions from the standpoint of the interest of the British government and BSC's management in minimizing its losses. Plaintiffs also posit that U.S. investors and lenders "customarily" inject funds in failing companies to minimize their losses, irrespective of any expectation of future profits.

(2) The investor should undertake all new investment schemes (or fund to completion existing investment schemes) where the discounted cash flows from the investment exceed the cost of the in-

[3] J. McAnneny, Calculation of Subsidies Under the Countervailing Duty Law: An Economic Analysis (July 8, 1985).

vestment (*viz.*, the net present value or "NPV" of specific projects or ventures are greater than zero).

Based on the application of the foregoing tests, McAnneny argues that investments by the British government in FY 1977/78 in BSC were consistent with "commercial considerations".

Capital-Raising Experiences of Six U.S. Steel Companies

As underpinning for their argument that BSC was creditworthy in FY 1977/78, plaintiffs heavily rely upon McAnneny's study of the capital-raising experiences of the six largest integrated U.S. steel companies during the three-year period 1982–84. In his study, McAnneny found that the three-year operating results of the six companies were as poor as or worse than those of BSC in the two years prior to FY 1977/78. Despite their unfavorable operating results, McAnneny found that each of the U.S. companies attracted significant amounts of debt and equity capital. Plaintiffs contend that under ITA's test, none of these companies should have been able to attract debt or equity capital, and consequently ITA erroneously determined that for FY 1977/78 investment in BSC was not commercially reasonable.

Defendants challenge the validity of McAnneny's conclusions on the grounds that: (1) he used a different time period, 1982–84, for his comparison of the returns on equity of the United States steel producers with those of BSC in FY 1977/78, thus failing to consider the different economic climate, different market and different investor expectations in the two time periods; (2) market and investor expectations would depend, in part, on the financial history of the domestic companies, as well as the prevailing economic conditions, which were not considered by McAnneny; and (3) McAnneny erroneously assumed that ITA looked only at BSC's performance for the two preceding FYs, 1975/76 and 1976/77, when in fact, ITA considered BSC's financial history for FYs 1973/74 to 1977/78. In short, defendants insist that the fact the U.S. companies raised debt capital in 1982–84 is irrelevant to the question of BSC's ability to obtain private investment in the different market prevailing in 1977–78; and that it is "sheer speculation to assert that, under ITA's test, the domestic companies would not have been considered commercially reasonable investments" (defendant's memorandum at 24).

The court agrees with defendants' position. The capital-raising ability of the United State firms having different financial histories and future prospects than BSC during the economic climate of 1982–84 does not refute ITA's finding that equity infusions by the British government in BSC in FY 1977/78 were inconsistent with commercial considerations.

"Variable Costs" Test

Plaintiffs further proffer McAnneny's "variable costs" test, *viz.*, that although a firm may show an overall loss, it should continue to operate so long as it can earn at least enough to cover its variable costs. The theory is that having covered variable costs, additional revenue can defray some of the fixed costs (costs that continue to exist even if production ceases, like rent). If a firm whose revenues did exceed its variable costs were to cease production, it would be foregoing revenue that could have helped to defray fixed costs. Accordingly, even though a firm may not be earning enough to cover its total costs (fixed plus variable, it would be economically rational to continue operations so that the overall loss would be minimized by the additional revenues. McAnneny maintains that equity funds used to help cover BSC's operating losses are not subsidies if BSC was covering its variable costs at the time.

As aptly pointed out by defendants, the variable cost test may be a useful analytical tool for the owner-manager as a means of deciding whether (and for how long) to continue operating a loss-incurring company, but the test is inapposite to investment decisions by private investors. Simply put, it would be unrealistic to expect a private sector investor to supply operating funds to a loss-incurring firm merely to permit the firm to continue operations to minimize its losses. Thus, while it may be perfectly rational for an owner to sustain loss-minimizing operations, it would not be commercially reasonable for an investor to provide funds for that purpose without adequate assurance of the future profitability of the enterprise and a return on his investment within a reasonable time. The record supports no such assurances for BSC in FY 1977/78. Under these circumstances, ITA properly rejected application of the variable costs test.

The court stresses here that equity infusions in loss-incurring companies do not *per se* confer a subsidy, and defendants have not so argued in this case. Defendants agree with plaintiffs that the sole fact a company has been incurring losses is not dispositive of whether investments are consistent with commercial considerations. On that score, defendants point out ITA found that equity investments in BSC in years prior to FY 1977/78 were consistent with commercial considerations despite the fact that the company was sustaining substantial losses.

Although not germane to the variable costs analysis, it should also be mentioned that McAnneny attempts to justify the British government's equity infusions in BSC on the theory that it is likely that "opportunity costs" in some form would have been incurred by BSC (*i.e.*, BSC's income would have fallen) had the British government failed to make its equity infusions in FY 1977/78. Again, such rationale may be applicable to the British government and BSC, who concededly had no option but to continue operation of BSC.

Nonetheless, avoidance of such opportunity costs by equity infusions are irrelevant to a reasonable investor analysis.

Net Present Value Test

Dr. McAnneny also urges that the Net Present Value (NPV) test be utilized in determining the commercial reasonableness of the British government's investments in BSC. Hence, McAnneny observes that under standard principles of economic analysis, the commercial reasonableness of capital expenditures by BCS on new projects must properly be judged against an evaluation of the NPV of each project. Thus, projects whose discounted cash flows show a positive NPV are commercially justified; projects whose cash flow show a negative NPV are not. According to plaintiffs, NPV analysis focuses upon whether investment in a new project is commercially worthwhile (positive), and it is irrelevant whether a capital project (or some combination of projects) returns the corporation to overall profitability. In support of NPV analysis, plaintiffs make reference to "concrete market examples" of private companies that had suffered heavy losses in successive years and nevertheless continued to make new capital investments.

Defendants, however, correctly observe that NPV analysis is largely predicated upon long-term earnings and interest-rate assumptions, which at best would be tenuous; and that BSC furnished analyses only of individual projects without any evaluation of those projects in terms of their effects upon BSC's overall operations and income-producing prospects.

While unquestionably NVP analyses were of importance to BSC's management, they were relevant to an outside investor only to the extent that the analyses showed how the investments in the individual projects would affect the overall operations and future profitability of BSC. Stated differently, from the investor's point of view, an investment would not be commercially reasonable if *overall* the company may still constantly lose money and never provide a reasonable return no matter how justifiable a company's decision respecting individual projects analyzed on the basis of NPV.

As stated by ITA in its remand results (record on remand, document 1 at 24–26):

> The plaintiff suggests that a better way of measuring the commercial reasonableness of investment in a company is to examine the company's decision on specific levels of production, capital expansion, and closing of plants. The Department agrees that a profit-maximizing company should use the types of analyses suggested by the plaintiff when making its managerial decisions on these issues, i.e., managers will attempt to set production at a level where marginal revenue equals marginal cost and will select among capital projects by comparing the net present values of alternative projects. However, while the Department does not take issue with the plaintiff on the eco-

> nomic validity of such tests, the Department believes tests of individual project decisions present too limited an appraisal of a company's overall condition to be the bases of the Department's methodology for evaluating purchases of equity. Such purchases relate to a company's operations as a whole, not just individual activities. Analyses of individual investment (disinvestment) projects, while laudable, are often meaningless in the context of a debate over the wisdom of equity purchases in a corporation. An individual project may be expected to be highly profitable, and indeed prove to be highly profitable once completed, yet the overall losses of the rest of the corporate investments may more than offset the new source of profitability. To the extent the Department should examine individual project appraisals, it should only do so if the respondent offering the appraisal also supplies contemporary analyses of the relevance of the project to the overall health of the corporation. For example, if a company is losing a billion dollars annually on all its investments and a new project provides a positive net return of $200 million, the company overall would still be losing $800 million annually and is, therefore, probably a bad equity investment.

Continuing, ITA commented (*Id.* at 26):

> British steel, in the several project analyses submitted in response to the draft results of the remand, has not provided any information as to the effect of these projects on the corporation's overall prospects for profitability. The Department's broader approach, which does not limit itself to an analysis of individual management decision but instead looks at the overall performance of the company in the context both of the company's views of its prospects and independent industry forecasts, gives a better picture of the overall condition of a company and the reasonableness of investment in it.

Another serious problem stressed in the Remand Results is that ITA

> might legitimately find a company that loses money year after year, and yet that same company can show it has never started a project without a thorough analysis that indicates the project will be profitable. An examination of the parts does not necessarily reflect the reality of the whole. [*Id.* at 27.]

The court holds that ITA properly declined to judge the commercial reasonableness of investment in BSC in FY 1977/78 on the basis of an economic analysis focused simply on the NPV of individual projects.

In sum, the court finds ITA's determination that the British government's investments in BSC in FY 1977/78 were inconsistent with commercial considerations, predicated upon its reasonable investor test, is supported by substantial evidence and otherwise in accordance with law.

ITA's Methodology for Valuing the Benefits From Equity Infusions

We now turn to the difficult issues concerning ITA's revised methodologies for valuing the benefits of the British government's equity infusions.

In its final determination in 1983, ITA calculated the value of the alleged subsidy benefits to BSC in accordance with the principles announced in *Certain Steel Products From Belgium,* 47 Fed. Reg. 39304, 39316 (1982) (Final) (Appendix 2). However, in its Remand Results, ITA followed the revised methodology announced in the 1984 proceedings involving steel imports from Mexico and Argentina ("revised methodology"). *Certain Carbon Steel Products From Mexico,* 49 Fed. Reg. 5142, 5148 (1984) (Preliminary); *Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina,* 49 Fed. Reg. 18006, 18016 (1984) (Final). Under the revised methodology, ITA allocated the subsidies arising from the British government's equity infusions over 15 years, irrespective of the use to which the funds were put. Such allocation period subsumed a stream of benefits lasting the average useful life of integrated steel-producing assets, as determined by the United States Internal Revenue Service.

ITA's allocation method is explained (record on remand, document 2 at 40):

> To allocate these benefits over time, the Department has considered various allocation periods including a variety of fixed time periods and the average life of long-term debt for a company or country, but has concluded that there are no economic or financial rules that dictate the choice of any one particular allocation period. Therefore, the Department has chosen a standard period—the average useful life of a company's renewable physical assets as determined by the U.S. Internal Revenue Service. The Department has openly stated that its choice is arbitrary in the sense that there are several viable options from which it could choose. However, within the context of the countervailing duty law, which dictates a period reflecting the commercial and competitive benefit of the subsidy, the Department believes its choice is reasonable. In addition to reasonableness, this standard offers predictability in the outcome of Department proceedings and, more importantly, eliminates inconsistent results between companies and countries.

Plaintiffs vigorously object to the use of the 15-year amortization period respecting subsidy funds that were not used to acquire long-lived assets,[4] but rather were used for other purposes. Specifically, plaintiffs argue that based on generally accepted accounting principles (GAAP):

[4] There is no dispute that only a portion of the subsidy funds provided by the British government during FYs 1977/78 through 1981/82 were used for the acquisition of capital assets.

(1) The benefit of funds used to purchase assets prematurely retired must be expensed in the year of retirement.

(2) The benefit of funds used to cover operating losses must be expensed in the year of receipt.

(3) The benefit of funds used to cover redundancy and closure costs must be fully recognized in the year the decision is made to close the facility.

It is plaintiffs' position that ITA's across-the-board application of a 15-year amortization period for valuation of these "non-capital" subsidies is arbitrary, unsupported by substantial evidence of record, contravenes GAAP, and fails to reflect the commercial and competitive benefit of the equity infusions.[5]

Preliminary to discussion of the merits of the parties' contentions, it must be recognized that judicial deference should be accorded agency construction of a statute that it is charged with enforcing, particularly with respect to the broad discretion of the agency to apply reasonable methodologies in implementing the law. *American Lamb Co., supra; Consumer Products Division, SCM Corp.*, 753 F.2d at 1039; *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984); *Smith-Corona Group, Consumer Products Division, SCM Corp.*, 713 F.2d at 1571; *Carlisle Tire & Rubber Co., Division of Carlisle Corp.* v. *United States*, 9 CIT ——, Slip Op. 85–110, 622 F. Supp. 1071 (October 24, 1985); and *Bingham & Taylor, Division, Virginia Industries, Inc., et al.* v. *United States*, 10 CIT ——, Slip Op. 86–14 (February 14, 1986) (judicial deference inapplicable where agency interpretation is contrary to statute and Congressional intent). Further, it should be stressed that ITA's methodology need not be the most reasonable in order to be upheld by this court, nor need it be the methodology that this Court would have selected had it been the decision maker. *Asahi Chemical Industry Co.* v. *United States*, 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982).

In a recent decision, *Alhambra Foundry* v. *United States*, 9 CIT ——, Slip Op. 85–130 (December 30, 1985), the court, while recognizing that ITA in its discretion may choose one methodology or another in calculating the benefits of bounties or grants, pointed up that "any methodology employed must reasonably accurately reflect factual information in the administrative record" (Slip Op. at 9). Moreover, the Federal Circuit recently cautioned that the administering authority's discretion is not "unbounded". *Freeport Minerals Company* v. *United States*, Appeal No. 84–1591, decided November 7, 1985, Slip Op. at 4 (citing *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 166–68 (1962). And of course, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress". *Board of Governors*, 106 S. Ct. at 686.

---

[5] Plaintiffs do not challenge the 15-year allocation period as applied to subsidy funds used to acquire long-lived assets.

Challenged here is ITA's methodology of allocating the benefits of the British government's equity infusion over 15 years, across the board irrespective of the use of the funds, representing the average useful life of capital assets in the integrated steel mills in the United States.

The legislative history of the Trade Agreements Act of 1979 shows that Congress recognized the concept of allocating the benefits of subsidies over a number of years, in conformity with the commercial and competitive benefit of the subsidy to the recipient:

> There is a special problem in determining the gross subsidy with respect to a product in the case of nonrecurring subsidy grants or loans, such as those which aid an enterprise in acquiring capital equipment or a plant. Reasonable methods of allocating the value of such subsidies over the production or exportation of the products benefiting from the subsidy must be used. *In particular, a reasonable period based on the commercial and competitive benefit to the recipient as a result of the subsidy must be used.* For example, allocating a subsidy in equal increments over the anticipated 20-year useful life of capital equipment purchased with the aid of the subsidy would not be reasonable if the capital equipment gave the recipient of the subsidy an immediate significant competitive benefit compared to what would be the situation without the capital equipment and compared to the competitive benefit the equipment would likely provide in the later stages of its useful life.

S. Rep. No. 249, 96th Cong., 1st Sess., at 85–86, 1979 U.S. Code & Ad. News at 472–473 (emphasis added).

Significantly, the Senate's report states that in allocating the benefit of the subsidy "a reasonable period based on the commercial and competitive benefit to the recipient as a result of the subsidy must be used". In the present case, ITA failed to adequately explain why a 15-year allocation period is reasonable based on the commercial and competitive benefit of the subsidies in question to BSC.

After careful review of ITA's methodology for allocating the benefits of the equity infusions, the court is constrained to conclude that linking the commercial and competitive benefit of the subsidies at issue to the 15-year average useful life of capital assets in the U.S. steel industry, while administratively convenient, is unreasonable and not in accord with Congressional intent that the benefits be allocated over a period of time reflecting *the commercial and competitive benefit of the subsidy to the recipient.*

The court recognizes that each of the valuation methodologies ITA considered has certain financial and economic "pitfalls" and an inherent element of arbitrariness. But the court fails to perceive any basis whatever in the legislative history of the Trade Agreements Act of 1979, logic or the facts of record for allocating the commercial and competitive benefit of the subsidies at issue over a

period linked to the average useful life of capital assets in the integrated U.S. steel mills.

ITA itself has conceded that the life of capital assets does not necessarily relate to the economic benefits of subsidy funds:

> [W]e recognize first that physical assets are often a *fairly small part of the cost of doing business,* and second that even in highly capital intensive industries the benefit of funds received * * * *has no particular relationship to the life of the machinery.*

Subsidies Appendix to *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina,* 49 Fed. Reg. 18006, 18018 (April 26, 1984) (Final) (emphasis added).

In the foregoing decision, ITA further candidly explained:

> We originally chose the average useful life of the assets because we believed the benefits of a grant somehow had a life approximating the life of the assets * * * *We now consider this belief wrong; the life of the benefits is not observable.*

Id. at 18021 (emphasis added).

Again, in *Certain Carbon Steel Products from Mexico,* 49 Fed. Reg. 5142, 5150 (Feb. 10, 1984) (Preliminary) ITA frankly stated:

> The "life" of the countervailable benefit is indefinitely diffused around the time that the cash benefit arises. Therefore, *the average life of equipment is arguably no more accurate a measure than simply choosing a number.* [Emphasis added.]

Fundamentally, "an arbitrary allocation of [the] benefit" cannot be sustained. *Michelin Tire Corp.* v. *United States,* 6 CIT 320, Slip Op. 83-136 (December 22, 1983), *vacated,* Slip Op. 85-11 (January 28, 1985).

As previously noted, plaintiffs maintain that the subsidies in dispute must be allocated in accordance with GAAP. Interestingly, a portion of the legislative history of the 1979 Act cited by plaintiffs indicates that Congress intended "relating the value of a subsidy *for acquiring assets* to their anticipated useful life, based on generally accepted accounting principles". H.R. Rep. No. 317, 96th Cong., 1st Sess. 75 (1979) (emphasis added). Hence, it is clear that Congress intended that GAAP should be used where the funds provide an enterprise with capital equipment or a plant. But, there is nothing in the legislative history of the 1979 Act suggesting that Congress expected that the value of a subsidy *not* used for acquiring assets be related to either the useful life of capital assets or to GAAP. Rather, in H.R. Rep. No. 317, *supra,* at 75, Congress stated that "[valuation] methods should include relating the benefit of the commercial advantage "*to the recipient*" (emphasis added). The subsidies at issue here—funds used by BSC to cover its operating costs (or defray operating losses), redundancy and closure funds and funds used to purchase assets prematurely taken out of use in the course of restructuring—obviously aid in keeping the recipient firm

in business and making it more efficient and competitive. Undoubtedly, therefore, the commercial and competitive benefit of these subsidies continue beyond the year of receipt and into subsequent accounting periods. *See* Slip Op. 85-26 at 22-23.[6] While plaintiffs are correct in asserting that *Michelin Tire Corp.* v. *United States,* 4 CIT 252 (1982), *vacated,* 9 CIT ——, Slip Op. 85-11 (January 28, 1985), suggested reliance on GAAP under certain circumstances, the *Michelin* court subsequently, upon further consideration of the matter, admonished against the use of valuation techniques that do not provide "a basic correspondence of the subsidy to the benefit." *Michelin Tire Corp., supra,* Slip Op. 83-136 at 3. "Expensing" the "non-capital" subsidies at issue in accordance with GAAP would not provide a correspondence of the subsidies to their benefit, and consequently GAAP should not be applied under the circumstances of this case.

Although previously rejected by ITA, with some justification,[7] intervenors nonetheless suggest that the benefit of the subsidies in question should be allocated on the basis that they relieve BSC of the necessity for issuing long term debt on a commercial basis. Intervenors' hypothesis is that the commercial and competitive benefit of the subsidies is not the specific uses to which the funds were put, "but rather in being able to avoid the alternative commercial cost of obtaining the funds. BSC thus gains a commercial and competitive advantage over nonsubsidized firms who must pay a commercial financing cost to get funds to carry out exactly the same purposes" (memorandum at 21).

Intervenors' proposal—for allocation of the subsidies in question on the hypothesis that long-term debt financing by BSC was the most likely commercial alternative to the government's equity infusions—comports with the following observations in *Michelin Tire Corp., supra,* Slip Op. 83-136, regarding the benefits of a subsidy:

> The benefits which must be withdrawn by payment of duty in the case of a subsidy are the benefits which result as a direct consequence of the subsidy. For a business, the direct consequences of receiving a gift of money normally are the elimination of the necessity of looking elsewhere for those funds and paying the price required by the alternative source of funds. The normal alternative sources of funding for business enterprises are two—the sale of shares in the business, carrying with it the obligation to share the profits, or the incurring of debt, carrying with it the obligation to repay the creditor with interest.

See also: Paul W. Jameson, *The Administration Of The U.S. Countervailing Duty Laws With Regard To Domestic Subsidies: Where*

[6] In its prior decision, Slip Op. 85-26, at p. 23, this court expressly rejected plaintiffs' contention that capital assets confer no further benefit after they are prematurely retired, and that consequently ITA must recognize in full (expense) the undepreciated cost of the asset in the year that it is taken out of use in conformance with GAAP.

[7] *See* Fed. Reg. at 18018.

It's Been, Where It Is, Where It May Go, 12 Syracuse Journal of International Law and Commerce, 59, 110 (1985), in which the author observes:

> Despite possible objections that a company may raise money through equity issues or long-term loans, it is usually preferable to allocate the value of a grant over the life of long-term debt rather than allocate the grant over the average lifetime of assets. One cardinal principle of the countervailing duty law is that the subsidy is the money received, rather than whatever is purchased with that money. When coupled with the principle that the value of the subsidy is its value to the recipient, it is apparent that it is more consistent to view a grant as a substitute for a long-term loan rather than something somehow tied to a company's assets. If one were to compare the grant to a long-term loan that a company would have to raise as an alternative (even to use a hypothetical long-term loan for a company that has none), and state that the amount of the subsidy is the difference between what the recipient of the grant must pay on the grant (nothing) and what the recipient would have been required to pay on a loan (principal plus interest), the result would be a subsidy that could very well be larger than the amount of the grant but would not violate GATT.

In summary, while the court need not at this juncture pass upon the merits of intervenor's suggested allocation technique, based upon long-term debt financing, the court ineludably concludes that ITA's 15-year allocation methodology, which links the commercial and competitive benefit of the equity infusions to the average useful life of capital assets in integrated U.S. steel mills, is neither supported by the record nor Congressional intent. Accordingly, the court finds that ITA's methodology is unreasonable and therefore not in accordance with law. Consequently, this action must be remanded to ITA for further consideration of other "viable options" that may more reasonably reflect the benefit of the subsidies in question.

British Government's Forgiveness of Indebtedness

In 1981, the British government forgave £509 million in long-term indebtedness owed by BSC to the National Loans Fund. In its Remand Results, ITA treated the loan forgiveness as an additional equity investment amortizable over 15 years.[8] For purposes of such amortization, ITA utilized an interest rate of 17.11 percent, representing the 1981 United Kingdom domestic corporate bond rate plus a risk premium. The weighted average interest rate on BSC's existing loans in 1981 was 11.57 percent.[9]

---

[8] As disclosed in BSC's annual report, the £509 million in loans forgiven in 1981 represents funds received by the corporation from 1967 through 1978. A similar loan forgiveness in 1971-72 occurred during the period in which ITA considered the British government's equity infusions to be consistent with commercial considerations and thus not to confer a countervailable benefit.

[9] The interest rate on BSC's loans ranged from 6.75 percent to 16.75 percent, with a weighted average rate for all of the loans of 11.57 percent.

Plaintiffs contend that ITA's methodology for calculating the benefit of the loan forgiveness, predicated upon 1981 interest rates and a 15-year amortization period, is arbitrary and fails to reflect the commercial and competitive benefit to BSC of the interest and principal payments forgiven. On that score, plaintiffs urge that inasmuch as the interest rates on the existing loans were fixed, absent the British government's forgiveness BSC would have *continued* to pay 11.57 percent—not a rate based on what new capital would have cost BSC in 1981, *viz.*, 17.11 percent. Plaintiffs also challenge ITA's 15-year allocation period as arbitrary since the remaining life of the loans in question was substantially shorter than 15 years and ITA inexplicably refused to use the repayment schedules associated with the forgiven loans.

The court fails to perceive any reasonable basis for ITA's action in valuing the benefit of the loan forgiveness on the basis of what it would have cost BSC to obtain new financing in 1981. BSC was incurring an average fixed interest rate of only 11.57 percent on the forgiven loans, and BSC would have been required to continue paying only that rate if the loans had not been forgiven. In evaluating the subsidy arising from the loan forgiveness, the commercial and competitive benefit to BSC is the actual financial burden that was removed by the loan forgiveness. Absent the loan forgiveness, BSC undoubtedly would have continued to pay 11.57 percent interest on its existing loans, and most assuredly BSC would not have refinanced its debt at a cost of 17.11 percent, which refinancing is implicit in ITA's methodology.

ITA's apparent predicate that but for the loan forgiveness by the British government, BSC would have relieved itself of its existing loans by new borrowing at the then current rate of 17.11 percent is, in the words of the United States Supreme Court, "economically senseless".[10] *Matsushita Electric Industrial Co. Ltd.* v. *Zenith Radio Corp.*, Appeal No. 83-2004, decided March 26, 1986. As previously emphasized, the commercial and competitive benefit of the subsidy to the recipient is the measure of the value of the subsidy. In the case of debt forgiveness, the commercial and competitive benefit to the recipient firm is debt extinguishment. Thus, it is logical that such subsidy should be measured by the actual interest and principal repayment obligations over the remaining life of the existing loans, rather than in accordance with hypothetical refinancing at a higher rate of interest than the firm is paying on its existing loans for an arbitrary period of years.[11]

---

[10] The obvious unreasonableness of ITA's loan forgiveness methodology may be illustrated by the following hypothetical case: In 1965 a British company borrows money from the government at an interest rate of 9 percent, to be repaid in 1982. In 1980 the government forgives the loan. The prevailing interest rate for corporate bonds in Great Britain in 1980 is 15 percent. Following the methodology applied to BSC in the present case, ITA would amortize the unpaid principal of the loan forgiven at 15 percent (plus a risk premium) over a period of 15 years.

[11] As pointed up by plantiffs, ITA offered no explanation in the Remand Results for its refusal to calculate the benefits associated with the 1981 debt forgiveness based on the actual interest rate BSC was incurring, nor for its use of a 1981 interest rate for loans to BSC during the period 1967-77, nor of its choice of a 15-year

Continued

The short of the matter is ITA's methodology for valuing the benefits associated with the British government's 1981 loan forgiveness is contrary to law and unsupported by substantial evidence. Therefore, this action is remanded to ITA for revaluation of the benefits of the 1981 debt forgiveness consistent with the foregoing opinion.

Conclusion

The Remand Results are affirmed insofar as ITA determined that the equity infusions by the British government in FY 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i), and therefore constitute countervailable subsidies.

ITA's valuation methodology in this case is unsupported by substantial evidence and otherwise is not in accordance with law because it fails to reflect the commercial and competitive benefit of the subsidies in question to the recipient.

It is, therefore, Ordered:

(1) The Remand Results are affirmed insofar as ITA determined that the equity infusions by the British government in FY 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i), and therefore constitute countervailable subsidies;

(2) This action is remanded to ITA for reconsideration of its revised valuation methodologies and recalculation of the benefits of the British government's equity infusions consistent with this opinion; and

(3) ITA shall report the results of its recalculations and redeterminations to this court within 60 days after the date of entry of this order.

amortization period. Plaintiffs have advised the court that the interest differential between 17.11 percent and 11.57 percent based on a 1981 balance of £509 million results in an overvaluation of the loan forgiveness benefit of nearly £29 million.

ABSTRACTED CLASSIFICATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Ite
C86/45	DiCarlo, J. March 26, 1986	Alfa-Laval Inc.	80-10-01697	Item 661.35 4.8%	Iten F
C86/46	DiCarlo, J. March 26, 1986	Pony Sports & Leisure, Inc.	84-3-00369	Item 700.95 12.5%	Iten 8.
C86/47	Carman J. March 28, 1986	Mattel, Inc.	81-4-00356	Item 737.22 17.5%, 16.8% or 16.1% for base stands and leg holders assessed with duty as entireties with dolls with which they were imported	Iten A F
C86/48	Carman J. March 28, 1986	Mattel, Inc.	82-5-00740	Item 737.22 17.5% or 16.1% for base stands and leg holders assessed with duty as entireties with dolls with which they were imported	Iten 8. Iten F

CATION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
e	Item No. and rate		
	Item 870.40 Free of duty	Agreed statement of facts	Detroit Bulk milk coolers or farm tanks
	Item 700.35 8.5%	Agreed statement of facts	Los Angeles Athletic footwear
r e g h d	Item A774.60 or A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders
g h d	Item 774.60 8.5% Item A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

C86/49	DiCarlo, J. March 28, 1986	Oxford Industries, Inc.	79-4-00617	Item 380.04, 380.81, 380.84, 380.94, 382.78, or 382.81 Various rates	Ite a fo o w u b o
C86/50	DiCarlo, J. March 28, 1986	Woods Manufacturing Co.	79-6-01038	Item 380.04, 380.81, 380.84, 380.94, 382.78, or 382.81 Various rates	Ite a fo o w u b o
C86/51	Carman, J. April 1, 1986	Mattel, Inc.	82-5-00741	Item 737.22 16.8% for base stands and leg holders assessed with duty as entireties with dolls with which imported	Ite F
C86/52	Carman, J. April 1, 1986	Mattel, Inc.	83-8-01140	Item 737.24 15.4% or 14.8% for base stands and leg holders which were assessed with duty as entireties with dolls with which imported	Ite F

or	Item 807.00 allowance made for cost or value of components which underwent a button-holing operation abroad	Judgment on the pleadings	Nogales Wearing apparel
or	Item 807.00 allowance made for cost or value of components which underwent a buttonholing operation abroad	Judgment on the pleadings	Nogales Wearing apparel
g h	Item A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders
g n l h	Item A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

ABSTRACTED CLASSIFICATION DEC

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Item
C86/53	Carman, J. April 1, 1986	Mattel, Inc.	83-10-01517	Item 737.24 15.4% or 14.8% for base stands and leg holders which were assessed with duty as entireties with dolls with which imported	Item Fr
C86/54	Carman, J. April 1, 1986	Mattel, Inc.	84-10-01449	Item 737.22 16.8% or 16.1% for base stands and leg holders assessed with duty as entireties with dolls with which imported	Item Fr e r i t c (t A 3 i 7

N DECISIONS—Continued

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
Item A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders
Item 774.55 Free of duty except for merchandise imported from the Republic of China (Taiwan) in the period April 1 to Dec. 31 1981, which is dutiable at 7.7%	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

C86/55	Carman, J. April 1, 1986	Mattel, Inc.	85-3-00326	Item 737.22 16.8% or 17.5% Item 737.24 14.8%	Items A77 A Fre ex m in th of (T Se w du 8.

Items A774.55 or A774.60 Free of duty, except for merchandise imported from the Republic of China (Taiwan) in Sept. 1979 which is dutiable at 8.5%	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

ABSTRACTED VALUATI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/20	DiCarlo, J. March 26, 1986	Papier Cascades (Cabano) Inc.	82-10-01356, etc.	Transaction value	Inv
V86/21	DiCarlo, J. March 26, 1986	Beer Precast Concrete, Ltd.	80-10-01589, etc.	Export value	Eq

UATION DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
Invoiced value, less total costs incurred for transportation, less brokerage fees, less customs duties	Agreed statement of facts	Champlain Various products exported from Canada
Equal to $303.37/ton, net, packed	Agreed statement of facts	Buffalo/Niagara Falls Prefabricated concrete construction materials

April 16, 1986

NOTICE OF PROPOSED RULE CHANGES

The Committee on Rules and Practice of the United States Court of International Trade is considering several proposed amendments to the Rules of the Court.

The proposed amendments pertain to Rules 3, 4, 47, 48, 60, 62 and 75.

The Committee invites comment on the proposed amendments, along with suggestions for additional changes in the Rules.

Those who wish to present their views should submit an original and one copy of a written statement to the Committee, in care of Joseph E. Lombardi, Clerk of Court, by the close of business on Friday, May 16, 1986. Each statement shall be typewritten and not more than 10 double-spaced pages in length. It also should bear an indication whether the views contained therein are solely those of the author or are submitted on behalf of a particular organization.

Copies of the proposed amendments may be obtained by writing the Clerk of Court or by calling 212-264-2800.

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

Procedural Handbook
Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10007.

ORDER FORM

Enclosed is $______(check or money order) made payable to Clerk, United States Court of International Trade for____ copy or copies of the Procedural Handbook.

NAME ________________________________

(Please type or print)

STREET ADDRESS ________________________

CITY AND STATE ________________________

ZIP CODE ______________________________

PHONE NUMBER __________________________

SUBSCRIPTION ORDER FORM

Customer's Telephone No.'s

Area Code | Home | Area Code | Office

Enclosed find $............... (check or money order), or charge to my Superintendent of Documents Deposit Account Number

☐☐☐☐☐☐☐ - ☐ *Your Order Number..........*

Please send the subscription(s) I have listed to the address shown at the bottom of this form.

MAIL ORDER FORM TO:
Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402

FOR OFFICE USE ONLY		
QUANTITY		CHARGES
______	Publications	______
______	Subscriptions	______
	Special shipping charges	______
	International handling	______
	Special charges	______
	OPNR	______
______	UPNS	
______	Balance Due	
______	Discount	
______	Refund	

Credit Card Orders Only
Total charges $________________. Fill in the boxes below:

Credit Card No. ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiration Date Month/Year ☐☐☐☐

Charge orders may be telephoned to our order desk at (202) 783-3238 from 8:00 a.m. to 4:00 p.m. EST Monday thru Friday (except holidays).

NOTE: Complete top address portion if different from that at the bottom.

Name ....

Street address ....

City and State .... ZIP Code..........

ID	TITLE	PRICE

COMPANY OR PERSONAL NAME

ADDITIONAL ADDRESS/ATTENTION LINE

STREET ADDRESS

CITY | **STATE** | **ZIP CODE**

(or) COUNTRY

PLEASE PRINT

Index

U.S. Customs Service

Treasury Decisions

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

ORDERING OF BOUND VOLUMES

Bound volumes may be obtained by returning the order form supplied herewith to: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Recently published bound volumes are noted below:

U.S. Court of Appeals for the Federal Circuit, Vol. 2, October 1983–October 1984. Supt. Docs. Stock No. 028-002-00044-1; Cost: $7 domestic; $8.75 foreign.

U.S. GOVERNMENT PRINTING OFFICE : 1986 O - 151-377

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
DEPARTMENT OF THE TREASURY (CUSTOMS)
TREAS. 552

CB SERIA300SDISSDUE030R 1 *
SERIALS PROCESSING DEPT *
UNIV MICROFILMS INTL *
300 N ZEEB RD *
ANN ARBOR MI 48106 *